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REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY

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NEW SERIES.

VOL. V.

NEW-YORK:

DIOSSY & COMPANY,

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1869.

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*Distinguished,
Co. Part. b. & g.*

ABBOTTS' PRACTICE REPORTS. NEW-YORK.

NEW SERIES.

OSGOOD *against* LAYTIN.

Court of Appeals ; June Term, 1867.

PLEADING.—COMPLAINT IN ACTION AGAINST TRUSTEES
OF CORPORATION MAKING DIVIDEND OUT OF
CAPITAL.—PARTIES.—ACTION
BY RECEIVER.

Where an insurance company, organized under the general law applicable to such companies, being insolvent, distributes its capital among its stockholders, thus placing it beyond the reach of its creditors, it acts in fraud of its creditors, and such fund may be recovered back from those who received it, by a proper action commenced by the proper parties.

The complaint in such case need not aver that in making such distribution it was done with an intent to defraud the creditors.

The receiver of the company, since he represents the creditors, is the proper person to bring such action. No creditor can individually maintain an action against an individual stockholder, for the share so illegally distributed to him; the liability is to the creditors generally, and the action should be commenced by some party representing all the creditors.

In such action it is proper for the receiver to join as defendants any creditors who have instituted such suits, and those who threaten to do so, for the purpose of protecting the stockholders from a multiplicity of actions.

N.S.—VOL. V.—1.

Osgood v. Laytin.

Appeal from a judgment on demurrer.

This was an action in which G. A. Osgood and Cyrus Curtiss, receivers of the Columbian Insurance Company, were plaintiffs (and respondents), and William Laytin, and many others, were defendants (and appellants). The action was brought for the purpose of recovering back dividends which the defendants, as stockholders, had received out of the capital, and of restraining creditors from prosecuting individual actions for the same purpose.

The Columbian Insurance Company was organized as an insurance company by virtue of of the general act authorizing the organization of such companies.

The company was dissolved by the judgment of the supreme court in February, 1866, and the plaintiffs were subsequently appointed receivers, as successors of the receivers originally appointed. The plaintiffs duly qualified, and gave the requisite security. In July, 1866, the company, being insolvent, paid a dividend of three and one-half per cent. upon its stock to the defendants, who were stockholders of the company. Some of the defendants, who were creditors of the company, commenced actions individually against several of the stockholders separately, for the purpose of recovering from them the amount of the dividend received by them respectively. Whereupon the plaintiffs commenced this action against all the stockholders of the company who had received dividends, and also against the creditors of the company who had commenced actions against the stockholders, demanding judgment against the stockholders severally for the amount of the dividends respectively received, and a judgment against the creditors, perpetually restraining them against the prosecution of suits against the stockholders of the company for the collection of the dividends received.

The complaint was in the following form :

[Title of the cause.]

“The plaintiffs complain and allege :

“I. That the Columbian Insurance Company was a corporation, duly organized under the general laws of the State of New York, in or about August, 1857.

“II. That on the 23rd day of January, 1866 [certain other persons, naming them] were duly appointed receivers of all the property and effects of the said Columbian Insurance Company, by the supreme court of the State of New York, at a special term thereof, held in the city and county of New York, upon proceedings duly taken therefor in an action therein pending, between [a third person, naming him] as plaintiff, and the said company as defendant, in which action judgment dissolving the company was duly rendered on the 2nd of February, 1866.

“III. That afterwards, on the 24th day of January, 1866, the said [naming both of the original receivers] duly qualified as such receivers, and filed all the security required of them by the said court, with the clerk of the city and county of New York, and were duly vested with all the property and effects of said corporation.

“IV. That on the 2nd day of March, 1866, the said supreme court duly discharged the said [naming one of the original receivers], at his own request, from his receivership, and ordered that the said [naming the other] should continue as the sole receiver of the said company.

“V. That on the 11th day of April, 1866, George A. Osgood [one of the plaintiffs] was duly appointed a receiver of all the property and effects of the said Columbian Insurance Company, by the said supreme court, at a special term thereof, held in said city and county of New York, to act in conjunction with the said [naming the remaining original receiver].

“VI. That afterwards, on the 13th day of April, 1866, the said Osgood duly qualified as such receiver, and filed all the security required of him by the said court, with the clerk of the city and county of New York.

“VII. That on the 29th day of June, 1866, the said [naming the original receiver remaining] died, and on the

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2nd day of July, 1866, by an order of the said supreme court, at a special term thereof, held in said city and county of New York, Cyrus Curtiss was duly appointed a receiver of all the property and effects of the said Columbian Insurance Company, to act in conjunction with the said Osgood.

“VIII. That afterwards, and on the said 2nd day of July, 1866, the said Curtiss duly qualified as such receiver, and filed all the security required of him by the said court, with the clerk of the city and county of New York, and the plaintiffs are now duly vested with the title to all the property and effects of the said corporation.

“IX. That on or about the 2nd day of January, 1866, the said Columbian Insurance Company paid a dividend upon the capital stock of the company to each of the stockholders, defendants herein, to the amount set opposite their names respectively, in the schedule hereto annexed, marked ‘A,’ which is made a part hereof.

“X. That all the defendants except [naming certain individuals who were joined because they were suing as creditors] were, at the time said dividend was paid, holders of stock in the said company, and each of them respectively then owned the number of shares of the par value of one hundred dollars each, stated in the schedule hereto annexed, marked ‘A,’ and received the amount of dividend upon said stock therein stated, at the time therein stated. That the defendants comprise all the stockholders of said company, except a few who did not receive said dividend.

“XI. That at the time of the payment of the said dividends, the said Columbian Insurance Company was insolvent, and no profits had been earned upon its capital, but such dividends were paid entirely out of the capital of the company, which was then greatly impaired, so as to be insufficient for the payment of the company’s debts without the return of such dividend: and shortly afterward, the proceedings above mentioned were taken, under which the plaintiffs were appointed receivers of the said company.

"XII. That the defendants [naming those who were excepted in paragraph X.] claim to be creditors of the said company, and as such, have commenced actions against a large number of the stockholders thereof, who are among the defendants, to recover the dividends received by them as aforesaid, and threaten to sue in like manner all the stockholders who received such dividends.

"XIII. That there are many other creditors of the said company who threaten to bring similar actions against its stockholders, and that such proceedings, if carried on, will result in a great multiplicity of suits, probably several hundreds in number.

"Wherefore the plaintiffs demand judgment :

"I. That each of the defendants named in the schedule hereto annexed, marked 'A,' pay to the plaintiffs the sum received by him on account of dividends from the Columbian Insurance Company as aforesaid, as set forth in schedule 'A,' hereunto annexed, together with interest thereon from the day upon which he received the same as aforesaid.

"II. That the defendants [naming those mentioned in paragraph XII.], and such other creditors as may hereafter bring actions of a like nature, be restrained by injunction from bringing any actions against any of the other defendants above named, or against any other stockholder of the Columbian Insurance Company, for the recovery of dividends received by them from the said company, and from proceeding in any such action already brought.

"III. That each and every one of the other defendants be restrained by injunction from paying, or securing to be paid, any dividend received by him from the Columbian Insurance Company to any person other than the plaintiffs."

Several of the defendants demurred to the complaint; the stockholders upon the ground that the facts stated constituted no cause of action; the creditors, upon the same ground, and also that the plaintiffs had

not legal capacity to sue; that there was a defect of parties defendant, and that several causes of action were improperly united.

Judgment was given for the plaintiffs upon the demurrers at special term, which was affirmed on appeal at the general term of the supreme court (see 48 *Barb.*, 463); from which the defendants appealed to this court.

D. D. Field, for the plaintiffs, respondents.

Elbridge T. Gerry, for defendants, stockholders, appellants.—I. The receivers cannot recover, unless upon the ground that as trustees they represent the entire body of creditors. (1.) A receiver is an officer appointed by the court to administer the assets of a legally incompetent corporation (*Smith on Rec.*; *Hutchinson v. Massarene*, 2 *Ball & Beatty*, 55; *Davis v. Malborough*, 2 *Swanst.*, 118; *Curtis v. Leavitt*, 15 *N. Y.*, 9). (2.) He is a trustee of the common interests of all the claimants, and must administer impartially those assets which he is bound by law to collect (*In re Burke*, 1 *Ball & Beatty*, 74). (3.) He alone is empowered by statute to collect assets of the corporation improperly disposed of (*Laws of 1858*, 506, ch. 314, § 2; 3 *Rev. Stat.*, 5 ed., 226; *Talmage v. Pell*, 7 *N. Y.* [3 *Seld.*], 328; *Pentz v. Hawley*, 1 *Barb. Ch.*, 122; *Nathan v. Whitlock*, 9 *Paige*, 152). (4.) And the receivers are by their appointment invested with all rights previously possessed by individual claimants (*Edw. on Rec.*, 141-2, and cases there cited; *Rankine v. Elliott*, 16 *N. Y.*, 377; affirming *S. C.*, 14 *How. Pr.*, 339). (5.) Hence, if the creditors had no legal right to enforce individual claims against the stockholders, no individual rights became merged by their appointment in the receivers.

II. The creditors had no legal right to bring separate actions against individual stockholders. (1.) The section of the act under which the individual suits were brought by the several creditors, provides as follows: "No dividend shall ever be made by any company incorporated under this act, when its capital stock is impaired, or when

the making of such dividend will have the effect of impairing its capital stock; and any dividend so made shall subject each of the stockholders receiving the same to an individual liability to the creditors of said company, to the extent of such dividend received by him" (*Laws of 1849*, ch. 308, § 20; as amended by 1 *Laws of 1857*, ch. 38, § 1; 4 *Edm. Stat. at L.*, 210, § 20). (2.) The object of this section is to provide a remedy for the creditors of a company when solvent, and prevent the improper dividend of assets. (3.) It confers no right on any one creditor to sue a stockholder. The latter is liable to the whole body of creditors, and hence any proceeding must be made in their collective name. (4.) And the section referred to, inasmuch as it inflicts a penalty, is to be construed strictly, by the well known rule as to penal statutes. (5.) And the cases seemingly *contra* have either been overruled, or else are decisions in cases of corporations organized under other statutes (*Hyde v. Lynde*, 4 *N. Y.* [4 *Comst.*], 387, superseded by *Laws of 1858*, ch. 314; 3 *Rev. Stat.*, 5 ed. 226; *Butterworth v. O'Brien*, 39 *Barb.*, 192; *S. C.*, 24 *How. Pr.*, 438, cited and explained, case following).

III. The receivers are not entitled, by virtue of their general powers as trustees, to recover these so-called dividends. (1.) The act under which this company was organized required the payment of the capital as a condition precedent to the transaction of business. (2.) By the terms of the statute, if the profits accruing are insufficient to liquidate the obligations contracted, the creditors have a right of resort to the capital of the company. (3.) Hence, as the stockholders are only entitled by the statute to the net profits, any division which compels a resort to the capital in order to discharge the obligations of the company, is strictly forbidden. (4.) Now the act of 1849, in such cases, authorizes the creditors (where no receiver is appointed) to recover the dividends so paid (4 *Edm. Stat. at L.*, 210, § 20). (5.) But that section contemplated only legal dividends, and did not create a right of action for pretended dividends appropriated from the capital stock (1 *Edm. Stat. at L.*, 548; 1 *Rev. Stat.*, 590, § 4. See

1 *Rev. Stat.*, 589, § 1, as to what is "a dividend"). (6.) Therefore, as, according to the eleventh section of the complaint, the dividend was paid out of the capital, it was concededly a misappropriation, and should have been sued for as such. (7.) And the specific objection here made is, that the complaint alleges that this so-called dividend was paid out of the capital stock, and yet seeks to recover as a dividend that which by its own showing was not a dividend.

IV. Nor can this complaint be sustained under the provisions of the statute authorizing receivers to recover the proceeds of the trust fund misapplied. (1.) No distinct averment of fraud appears in this complaint in support of such an action and recovery (*Laws of 1858*, 506, ch. 314, § 2; 3 *Rev. Stat.*, 5 ed., 226). (2.) Nor does it even appear that the directors who misapplied the funds have been proceeded against to no purpose, or are parties to this action. And *non constat* but they are entirely responsible (*Curson v. African Co.*, *Skinner*, 184). (3.) So that, though fraud must be alleged and proven, and it cannot be presumed, the complaint contains no allegation that "this property was improperly disposed of,"—which was assumed to be the case in the court below.

GROVER, J.—The point presented by the stockholders who have demurred is, that the plaintiffs cannot recover from them the sums received as dividends, for the reason that the complaint shows that the same was paid out of capital, and not out of the profits, and is not therefore a dividend within the meaning of the law, but a misappropriation of capital, and does not therefore come within the meaning of the statute. I am at a loss to discover how the argument that money paid by the company to its stockholders, although paid as a dividend, is not such, in a legal sense, if sound, can at all benefit these defendants. *Laws of 1858*, 506, § 1, among other things, provides that the receiver of an insolvent corporation may, for the benefit of creditors, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of

any creditor. From the facts stated in the complaint it is manifest that a distribution of the capital of the company, or any part of it, among the stockholders, was a fraud upon the creditors. It is alleged that the company was at the time insolvent.

It must be presumed that the directors, at the time of declaring the dividend, were cognizant of this fact, as it was the duty of each to examine into the affairs of the company before making a dividend, and, when making it, to know that it was made from net profits belonging to the company.

If the company, being insolvent, distributes its capital among stockholders, thus placing it beyond the reach of its creditors, such act is a fraud upon the creditors, and falls directly within the provision of the statute above cited. It is insisted by the counsel for the stockholders, that to authorize the plaintiffs to recover, by virtue of the above statute, from the stockholders, the complaint should aver an intent, in making the distribution, to defraud the creditors.

I do not think this necessary. Ignorance of facts that it was the duty of the managers to know, not to know which was gross negligence, cannot excuse the managers, and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors. But I do not think the position sound. Section 20 of the act to provide for the incorporation of insurance companies, as amended in 1857 (4 *Edm. Rev. Stat.*, 210), provides that "no dividend shall ever be made by any company incorporated under this act, when its capital stock is impaired, or when the making of such dividend will have the effect of impairing its capital stock; and any dividend so made shall subject each of the stockholders receiving the same to an individual liability to the creditors of said company, to the extent of such dividend received by him." This shows that the legislature used the term dividend in its proper sense—that is, a sum of money distributed *pro rata* among the stockholders, without reference to the source from which it was taken or paid.

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The fact of its being illegal to make a dividend of anything but net profits does not at all tend to show the meaning of the legislature in the use of the word. The design plainly expressed by the language of the section was to prohibit a dividend of the capital among the stockholders, and to preserve the same intact as a fund for the payment of creditors and security of dealers. It follows that the dividend in the present case was illegal, and that the stockholders receiving the same are liable to the creditors for the amount by them respectively received. The next question is, how is this to be recovered from the stockholders? Their liability is to the creditors of the company.

It is clear that no one creditor of the company can maintain an action against an individual stockholder, for the reason that the liability created by statute is to the creditors generally, and not to individual creditors, thus creating a liability to the creditors jointly. Again, a creditor, if permitted individually to sue the separate stockholders, might institute actions against each, although his demand amounted to far less than the aggregate liability, and he would continue a creditor until he had obtained satisfaction of his debt, and could obtain judgment in all the actions. Again, in equity this liability inures to the creditors in proportion to the amount of their debts respectively.

The maxim "that equality among creditors is equity," is applicable to the case. A court of law cannot, in a joint action by all the creditors, work out this equity and do justice between the parties.

This confers jurisdiction in equity, upon the ground that there is no adequate remedy at law.

The plaintiffs, as receivers, are trustees for all the creditors, and the appropriate parties to prosecute in their behalf, thus avoiding the troublesome inquiry as to who are creditors in the proceeding, to collect from the stockholders the several amounts each is liable to pay. All the stockholders who are liable may, and should, be included as defendants in the same action. There is no difficulty

in determining the amount each is to pay, upon the trial of the cause ; and, in case the whole amount of the liability is not required for the payment of the debts of the company, the precise amount each is to pay can be determined in the action.

This course of proceeding is also necessary to prevent multiplicity of actions, as there are several hundreds of stockholders.

The above views dispose of the case as to the stockholders.

The creditors insist that they are not proper parties to the action against the stockholders, and that upon this ground they are entitled to judgment upon the demurrer.

Equity having the power to enforce payment from the stockholders, and an action having been instituted in the proper mode for that purpose, which in its result will place the fund in the possession of the court for distribution among the creditors, it is the duty of the court to protect the stockholders from being harassed by other actions instituted to enforce the same liability.

This can only be done by restraining such actions. To enable the court effectually to do this, those creditors who have instituted such suits, and those who threaten so to do, are proper parties to the action.

The judgment appealed from should be affirmed.

All the judges concurred.

Judgment affirmed.

MECHANICS' BANK *against* STRAITON.

Court of Appeals ; January Term, 1867.

BILLS, NOTES AND CHECKS. — PLEADING.

The words " or order," " or bearer," and " bearer," in notes, bills, and checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words are used in place of naming a payee.

Mechanics' Bank v. Straiton.

In an action against the maker of negotiable paper, payable to bearer, it is sufficient, after alleging that the defendants drew it, to allege that it was transferred and delivered to the plaintiff, without saying by whom, if it be also alleged that the transfer was for value, and that the plaintiff is the owner.

Appeal from a judgment on demurrer.

This action was brought by the Mechanics' Bank of the city of New York, against John Straiton, Charles G. Sanford, and Thomas J. Raynor, on a check drawn by the defendants.

The allegations of the complaint were as follows :—

That said plaintiff is a banking association duly organized under and pursuant to the laws of the State of New York, and is now, and for several years last past has been engaged in business as such banking association at the city of New York.

The plaintiff further states, on information and belief, that at the time of the drawing of the bank check, or draft hereinafter mentioned, the above-named defendants were copartners in business in said city of New York under the firm-name or style of Straiton, Sanford & Co.

That at the city of New York, on the 4th day of June, 1860, the said defendants by their said firm-name of Straiton, Sanford & Co., drew their certain bank check or draft, of which the following is a copy :

“No. 4,511. New York, June 4th, 1860.

“Bank of the Republic,—

“Pay to bills payable, or order, one thousand three hundred dollars.

“\$1,300.

“STRAITON, SANFORD & Co.”

That said check or draft was afterwards, for a valuable consideration, transferred and delivered to the plaintiff, whereby said plaintiff became, and is now the holder and owner thereof.

That the said check was, after such transfer to the plaintiff, and on its behalf, duly presented for payment

at the said Bank of the Republic to the paying-teller of said bank, and payment thereof was then and there demanded, which was refused, and the same was not paid, whereupon the said check was protested for non-payment, of which said presentment, demand, refusal, non-payment, and protest, notice was given to the said defendants, as the plaintiff is informed and believes.

That the said defendants have not, nor has either of them, paid the said check, or any part thereof, but the whole amount thereof remains due, owing, and unpaid, from said defendants to said plaintiff, which amount, with interest, the plaintiff claims from the above defendants.

Wherefore, &c.

The defendants demurred to the complaint on the grounds :

“*First*.—That the alleged bank check or draft, of which a copy is set forth in the complaint, is an irregular instrument, not negotiable, and void.

“*Second*.—That the said complaint does not state facts sufficient to constitute a cause of action.”

The demurrer was overruled at a special term in the 2nd district, and, the judgment having been affirmed at a general term, the defendants appealed to the court of appeals.

James C. Carter, for the defendants, appellants.—I. It is a necessary averment that defendants not only *drew* the check, but *delivered* it. It is not the mere making of a negotiable instrument that binds the maker. He must *deliver* it also. *Non constat*, for aught that appears in this complaint, but that it was stolen.

II. The paper upon which the action is brought is a mere irregular instrument, void on its face. It fails to comply with the fundamental requisite of a bill or check, namely, that the payee should be *designated* in it, or it be made payable to *bearer* (*Chitty on B.*, 156; *Pyles on B.*, 60; *Douglass v. Wilkeson*, 6 *Wend.*, 637). (1.) It is for the very reason that such privileges are attached to these

instruments, that the law rigidly requires that they should exactly conform to certain rules, among which is the one before mentioned. (2.) That the instrument in question is not payable to any *designated person*, is plain on its face. That it is not payable to bearer, is equally plain. It is made expressly payable *to order*. (3.) That a person holding a bill or check, payable to order, who cannot identify himself as the payee named in it, nor show indorsement by the payee, can yet recover upon it as a mere bearer, would seem too preposterous to require refutation, were there not some show of authority in its favor. An authority to this effect, however, is found in *Willeys v. Phoenix Bank*, 2 *Duer*, 121. (4.) The facts in that case are so essentially different from the case at bar, in the very particular upon which the judgment of the court turned, that it is no authority for the plaintiffs here. (5.) There was another point in the case, which was made the principal one, both in the arguments of counsel and the opinion of the court, and the present question seems to have received but little consideration. The opinion of the court upon it is founded entirely upon the case of *Minet v. Gibson*, 3 *Term*, 481; S. C. in Error, 1 *H. Bl.*, 569. (6.) The doctrine declared in *Minet v. Gibson* was itself an invasion of the principles of the law merchant, and is certainly not to be extended beyond the limits which were then assigned to it. The dissenting opinion of Lord Chief Baron EYRE was unanswerable; and Lord ELLENBOROUGH subsequently distinctly intimated his disapproval of the decision, and his determination not to extend it (See opinion of EYRE, L. C. B., 1 *H. Bl.*, 598; *Burnet v. Farwell*, 1 *Camp. N. P.*, 130; S. C., on motion for new trial, *Id.*, 180, *c*; for a statement respecting the Livesay frauds, see *Byles on B.*, 62). (7.) The doctrine declared in *Minet v. Gibson* furnishes no authority for the decision in *Willeys v. Phoenix Bank*. The facts upon which all the reasoning in it turns are just the ones which are absent from the latter case. In *Minet v. Gibson*, the acceptors knew when they accepted the bills that the payee was fictitious, and that no valid title could be made to

them by the holders, and that the holders were ignorant of such fact, and had paid value for the bills. This essential feature was not presented in *Willets v. Phoenix Bank*. The bank knew no more about the checks when they were certified than the holder did. The checks were in fact just what they purported to be, nothing less and nothing more. Lord KENYON (who concurred in the decision in *Minet v. Gibson*) held that the doctrine was not applicable to a case where the party taking the bills knew as much as the acceptors did about them (*Hunter v. Jeffrey*, 1 *Peake, Add.*, 146). (8.) The considerations already presented show that the case of *Willets v. Phoenix Bank* was erroneously decided. The same considerations apply with increased force to the case at bar, for the action is not against a bank on a certified check, but against the drawers, without any allegation that they received value for it, or negotiated it. (9.) The case of *Willets v. Phoenix Bank* is no authority for the plaintiffs here, inasmuch as the decision is put on the express ground of an estoppel on the bank, arising out of their certificate. There is nothing in the mere drawing of a check, without negotiating it, to furnish the materials for such an estoppel as is requisite to the plaintiffs' case. (10.) Estoppels are preclusions from showing the truth *in matters of fact*; but they never preclude a man from availing himself of the truth when it appears on his adversary's own case. When a plaintiff has made a good case in pleading, the defendant is sometimes estopped from pleading something which vitiates that case; but there is no instance in the range of the law where a man has been estopped from demurring. So when a plaintiff makes out a *prima facie* case by proof, the defendant is sometimes estopped from proving some fact which would vitiate it; but the defendant is not estopped from moving to nonsuit, or taking such other step as might be necessary to test the law as it stood on the plaintiffs' own case. (11.) Our statutes have partially extended the doctrine declared in *Minet v. Gibson*, as to bills, to promissory notes, but the maker of a note, payable to a ficti-

tious payee, cannot be charged by the bearer, unless the maker negotiated it. (12.) A bill, payable to "*Ship Fortune, or bearer,*" has been held to be good and negotiable. The decision would have been the other way had it been payable to "*Ship Fortune, or order* (Grant v. Vaughan, 3 Burr, 1516).

SCRUGHAM, J.—The rules which establish the negotiability of commercial paper apply to bank checks as to other bills of exchange, and the doctrine that when such instruments are made payable to the order of a fictitious payee, they are to be construed and treated as payable to bearer, is too well settled to admit of serious question. In the great case of *Gibson v. Minet* (1 H. Bl., 569), the determination proceeded upon the ground that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer.

The words, "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability, without which or other equivalent words the instrument will not possess that quality, and therefore the use of either of these expressions by the drawer of a bill or maker of a note, must be regarded as indicating his intentions that the paper shall be negotiable.

By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement,—*i. e.*, in the same manner as if it had been made payable to bearer.

It was not, before the Code, necessary for the holder of an instrument payable to bearer, to allege or prove in an

action against the maker the transfers through which he derived his title (2 *Greenl. on Ev.*, § 161, and cases there cited ; 3 *Phill. on Ev.*, 4 Am. ed., 191) ; and it certainly is not now.

The engagement is to pay to the bearer ; and that the plaintiff is such is one of the material elements of his cause of action.

The fact must, therefore, be stated in his complaint, and its statement will be a sufficient allegation of his title ; for it is the fact, and not evidence of the fact, which is required to be pleaded.

It is not only stated in the complaint in this action that the plaintiff is the holder and owner of the check, but also that it was transferred and delivered to him for a valuable consideration, and that he became its owner and holder by virtue of that transfer and delivery. This cannot be true unless the drawer of the check transferred and delivered it directly to the plaintiff, or to some other person by or through whom it was transferred to the plaintiff ; and this averment, if an allegation of a transfer and delivery by the drawer is necessary, is sufficient on demurrer, within the cases of *People ex rel. Crane v. Ryder* (12 *N. Y.* [2 *Kern.*], 433), and *Prindle v. Caruthers* (15 *N. Y.*, 425).

The judgment should be affirmed.

All the judges concurring, judgment affirmed.

affirmed
7 Oct 39 2m

HILL *against* PLACE.

New York Superior Court; Special Term, April, 1867.

DEFENSES IN ACTION ON NOTE.—PLEA OF TENDER.— PAYMENT INTO COURT.—PROTEST.

The deposit in bank of money to pay a note drawn payable at such bank, is not a payment, nor does it preclude the holder from sustaining an action against the maker for the amount due.

Such deposit is simply a tender; and if pleaded in the suit thereafter brought, it bars recovery of interest subsequent to the tender, and of costs subsequent to payment into court, if plaintiff accepts the money; but if he does not, and defendant on the trial establishes his tender, it bars the recovery of interest subsequent to the tender, and all costs, and entitles defendant to costs; but the plaintiff is still entitled to recover the amount of the note.

It is essential to an answer setting up a tender, to aver that the money has been actually brought into court.

In an action on such a note, it is not necessary to aver or prove demand of payment at the place at which the note was payable, nor is it necessary to aver or prove protest, as against the maker.

Motion for a new trial.

This action was brought by James K. Hill against George Place, on a promissory note, made by defendant, payable at the Hanover National Bank, in the city of New York.

The defense set up was, that on the last day of grace there was sufficient money deposited in the Hanover National Bank to pay the note, which money was allowed to remain there for the purpose of paying the note, for several days.

There was no allegation in the answer to the effect that defendant, simultaneously with putting in the answer, brought the money into court, or to the effect that the money had been brought into court prior to the putting

of the answer. In point of fact, the money had never been brought into court.

On the last day of grace, between 10 and 11 o'clock in the morning, the note was presented at the bank for payment, and payment demanded, which was refused. Subsequently to this demand, the money to pay the note was deposited, but no notice of this fact was given to the holder of the note, nor was the note again presented for payment at the close of banking hours.

There was proof that it is the custom to present notes for payment between ten and three o'clock, but that the maker has until three o'clock to pay the note, and it cannot be protested until after three; that, according to the custom, it is necessary, if a note on a presentment made prior to three o'clock is not paid, to present it again after three o'clock before it can be protested.

The court directed a verdict for the plaintiff.

The defendant now moved, on the minutes of the judge before whom the case was tried, for a new trial.

William Weston, for the motion.

J. R. Hills, opposed.

JONES, J.—The deposit in a bank at which a note is payable, of sufficient money to pay it, is not a payment of it, nor is it such an extinguishment that the holder cannot thereafter recover from the maker, in an action brought, the amount due on the note.

Such deposit is simply a tender of the amount, and as such, if properly pleaded to a suit thereafter brought, it bars the recovery of interest subsequent to the tender, and of all costs subsequent to the payment of the money into court, if the plaintiff accepts the money; if, however, the plaintiff does not accept the money, but goes to trial, then, if defendant establishes his defense of tender, such defense bars the recovery of all interest subsequent to the tender, and all costs, and entitles the defendant to costs. But this is the only effect of a plea of tender. It does not

in any event bar a recovery of the principal amount due, with interest to the day of tender (*Wolcott v. Van Santvoord*, 17 *Johns.*, 247; *Caldwell v. Cassidy*, 8 *Cow.*, 271; *Grah. Pr.*, 454-460; *Burrill's Forms*, ed. May 4, 1840, 338).

Conceding then, that the tender in this case was sufficiently pleaded, still the plaintiff would be entitled to recover the amount of the note, although he would have to pay the costs of the action.

But the tender is not sufficiently pleaded. There is no allegation in the answer that the money then was, or therefore had been, brought into court; and in point of fact, the money never has been brought into court.

To make a plea of tender good and sufficient, it is necessary, not only that the money should be actually brought into court, but that the answer should aver that fact (see cases above cited).

It, therefore, follows, that neither the answer nor the proof given under it, constituted a bar to plaintiff's recovery of the debt, of the interest thereon, and of the costs of suit.

Defendant, however, suggests that plaintiff cannot recover unless he has demanded payment at a place at which the note is payable, and that such demand must be made after three o'clock on the last day of grace.

No demand whatever is necessary to enable the plaintiff to maintain his action (*Wolcott v. Van Santvoord*, 17 *Johns.*, 247).

Consequently, in this aspect of the case, it is unnecessary to consider the effect of a demand between ten and eleven in the morning, not followed up by a demand after three.

If the tender had been sufficiently pleaded, then the question might arise, whether a deposit made before three on the last day of grace, but after a demand and refusal at an earlier period of the day, would amount to a tender.

As under the present pleadings, it is unnecessary to pass on that point, I refrain from considering or intimating an opinion on it.

As it is wholly unnecessary, in any case whatever, to protest a note for non-payment as against the maker, the questions as to whether the custom proved to exist in the city of New York, that a note payable at a bank on a certain day cannot be protested until after three P. M. of the last day of grace, can be allowed to have any effect at all, and, if it has any effect, then what that effect is, do not arise for decision.

Motion for a new trial must be denied with \$10 costs.

From this decision the defendants appealed to the court at general term, where the cause was heard, and in Oct., 1867, the decision reported was affirmed upon the grounds stated in the foregoing opinion. No further opinion was delivered by the court at general term.

CANTER *against* THE PEOPLE.

Court of Appeals; March Term, 1867.

ACQUITTAL.—PLEA OF AUTREFOIS ACQUIT.—VARIANCE, OR FAILURE OF PROOF.

To sustain the plea of a former acquittal as a defense to an indictment, it must appear that the party was "put in jeopardy" by the former trial. A plea of an acquittal, alleging that it was "on the ground of a variance between the indictment and the proof, the variance being that the proof failed to show" certain facts necessary to establish the offense alleged, is not sufficient, under the provisions of the Revised Statutes, as a bar to a trial and conviction upon a subsequent indictment for the same offense.

Writ of error to the supreme court.

The writ was brought to review a judgment affirming a judgment of the general sessions, by which the plaintiff in error, Canter, was convicted of forgery.

Upon the trial of the prisoner on an indictment for forgery, he interposed a plea stating that theretofore, in the year 1865, a grand jury had presented a former indictment against him for the same offense, to which he pleaded "not guilty," and upon his trial, a jury having been impaneled and heard the testimony and the charge, considered their verdict "and found said Canter not guilty, on the ground of a variance between the indictment and the proof, and so said they all, as by the record thereof it doth more fully appear; which said judgment still remains in full force and effect, the said variance being that the proof failed to show that the said Canter had the said bank note in his possession with intent to utter and pass as a true bill and note; and the said Canter further saith, that the said Canter so indicted and acquitted as aforesaid, and he, the said Canter, who is charged in the present indictment, are one and the same person, and not other and different persons, and that the said offense of forgery in the said former indictment mentioned, and the said offense of forgery in the present indictment, are one and the same offense of forgery, and not divers and different offenses; and that the said bank note in the said former indictment mentioned, and the said bank note in the present indictment mentioned, were had and held by him, the said Canter, at the same time and place, and under the same circumstances and with the same want of guilty knowledge and criminal intent to injure or defraud; and further, that both these said bank notes were in and constituted a part of the same package and parcel of bank notes, and were found in his possession, and taken from his possession at the same time, on the same occasion, by the same person, and under the same circumstances, and were not held by him at any other or different time or place, nor under any other different circumstances, nor with any other different knowledge, and were not taken from his possession upon any other or different occasions, nor under other or different circumstances, nor by any other or different person, and this he is ready to verify.

“Wherefore, since he the said Canter, hath already been heretofore acquitted of the offense of forgery aforesaid, he prays judgment, and that by the court he may be dismissed and discharged from the said premises in the present indictment specified.”

The plea was overruled, on a demurrer by the district-attorney, and the prisoner was tried upon the second indictment, found guilty, convicted and sentenced.

The judgment was affirmed by the supreme court at general term, but no opinion of the court was delivered.

S. H. Stuart, for the plaintiff in error.—The prisoner was arrested, and in his possession were found a number of counterfeit bank notes—all in one and the same package. He was indicted and tried for having one of these notes in his possession, with intent to utter it as true, with intent to cheat—the others being given in evidence to show guilt. The prisoner was acquitted, upon the alleged ground of variance between the proof and indictment—the variance being that the proof failed to show that the prisoner had the note in possession, with intent to utter it as a true note, with intent to cheat. (See plea in bar.) The variance was that the proof failed to support the indictment—nothing more; which is true of every case of acquittal for want of proof. This acquittal, therefore, was not for variance, but was simple and absolute. After this unqualified acquittal, another note was taken from the same package found upon him at the same time (see plea in bar), and made the subject of a second indictment, in which the prisoner was charged with having it in his possession, with intent to utter as false, with intent to cheat. On that indictment the prisoner interposed a plea of former acquittal, to which the people demurred. The court gave judgment against the prisoner, who was thereupon tried and convicted. A possession of all these bills at the same time and place, and with the same intent, was but one and the same act—and the prisoner could not be tried for as many felonies as there were bills found upon him; and having been tried for a criminal possession of one, and

fully acquitted (the alleged variance being in fact no variance), he could not be again tried for a criminal possession of any more of them, and for this reason the judgment ought to be reversed. See Van Keuren's Case, 5 *Park. Cr.*, 66, and the cases there cited.

A. *Oakey Hall*, for the defendants in error.—I. Is not this the test: "If the prisoner could have been convicted on the first indictment by proof of the facts alleged in the second, then the acquittal would be a bar." See Turner's Case (*Kel.*, 30); Jones & Bever's Case (*Kel.*, 52; and 1 *Rus.*, 831); and in a later case the court illustrates the rule thus: "So if a man steal twenty sheep from the same person at *different times* on the same day, or wound a person at *several times* on the same day," a conviction for one of such offenses would not bar an indictment for another of said offenses (*Rex v. Barry, Carr. & P.*, 836), leaving the inference, irresistibly, that if the twenty sheep were all stolen, or the wounds were all inflicted at *the same time*, an acquittal on an indictment for one of the sheep, or one blow, would bar all the rest; and this was substantially held in *Regina v. Martin* (8 *Ald. & Ell.*, 482). See 1 *Chit. C. Law*, 371.

II. This principle is analogous to splitting demands in civil actions. If the prosecutor had brought an action for one of the bills found on the defendant, he could not subsequently have maintained an action for another of the bills, under the admissions of the demurrer (15 *Johns.*, 432; 16 *Id.*, 136; 15 *Id.*, 229; 15 *Wend.*, 557).

III. Would not the accused have been convicted on the *first* trial by proof that he had the *package* containing the bill set out, in his possession, with intent to utter it as false? The greater includes the less, and the intent cannot be severed. If he had any intent, it applied to the whole package, for presumed intent must spring from the facts as they are proved. He could not be convicted on the first indictment without proving possession of the whole package as it was found, and the proof would be the same on the trial of the second indictment, differing

only in the fact that each bill was counterfeit. This difference would occur in the case of the larceny of the twenty sheep, cited by Ch. J. BULLER, by way of illustration. If one of the sheep was black, and the other nineteen white, an acquittal on indictment for stealing the black sheep would bar a prosecution for stealing the white sheep at the same time and as one act, although the proof as to identity would necessarily vary. So, if A. should steal a *box* containing knives, forks and spoons, an acquittal on indictment for stealing the spoons would bar an indictment for stealing the knives and forks contained in the same box, although the proof would vary as to the articles. The reason is that there is but one act of stealing, and that act embraces all the articles taken at the same time and in one parcel.

IV. Again, an acquittal, if on the merits, embraces all the elements necessary to complete the offense. 1st, the possession ; 2nd, the intent of the possession ; and 3rd, that the thing possessed was counterfeit, and these elements apply to the package as a whole. If each bill had been separately passed off by the defendant, then separate indictments would lie, for the offense would then be different, to wit, uttering the money, knowing it to be counterfeit. But here it is the possession which is charged to be felonious, and that was an entirety, and was tried on the first indictment (*People v. McGowan*, 17 *Wend.*, 386 ; *People v. Ward*, 15 *Wend.*, 231).

V. There is no force in the objection that the acquittal was in consequence of a variance between the indictment and proofs, as it is explained in the case. It amounted simply to a finding that the indictment was not proved, which is the case of every acquittal on the merits. If the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment ; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not (*Rex v. Sheen*, 2 *Carr. & P.*, 635 ; *People v. McGowan*, 17 *Wend.*, 386).

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VI. The true meaning of the verdict is, that the intent of the possession was not felonious ; not that he had not the possession, and the possession being that of the package as a whole, the intent was entire, and the finding of the jury is conclusive as to all the parts of the package.

DAVIES, Ch. J.—The plaintiff in error was indicted in the New York general sessions in June, 1865, for that, willfully and feloniously on the 1st of February in that year, he had in his possession a certain forged and counterfeit note commonly called a bank note, issued by the Mechanics' Bank of New Haven, in the State of Connecticut, of the denomination of ten dollars, with intent then and feloniously to utter and pass the same. Upon the arraignment of the prisoner, he interposed an *autrefois acquit*, which set forth an indictment found against him in the same words as the present indictment, for having in his possession a like false and counterfeit bank-note of the denomination of ten dollars, issued by the Northfield Bank, of the State of Vermont, with like intent to pass the same ; that upon said last-mentioned indictment the prisoner was arraigned and pleaded not guilty, and was put upon his trial, and that the jury then and there impanelled rendered their verdict that the said prisoner was not guilty, on the ground of a variance between the indictment and the proof. The plea then averred that the offense of forgery in the present indictment, and the said offense in the former indictment, are not diverse or different offenses, and the plea then proceeds to show wherein the offense charged in the former indictment was the same offense as that set forth in the present indictment, wherefore, as the prisoner had already been heretofore acquitted of the offense of forgery aforesaid, he prayed judgment that he be dismissed and discharged from the present indictment. The district-attorney then and there demurred to said plea, and the prisoner joined in the demurrer ; and after hearing counsel thereon, the said plea was overruled by the court, and judgment was given thereon for the people, and thereupon the prisoner was arraigned

upon said indictment, and pleaded not guilty and demanded a trial.

He was subsequently convicted of forgery in the second degree, and sentenced to be imprisoned in the State prison at hard labor for the term of ten years.

The judgment of the general sessions was affirmed in the supreme court, and the prisoner now brings his writ of error to this court.

Assuming, as we may for the purpose of deciding this case, that the offense set forth in the first indictment, and upon which the prisoner was tried and acquitted, was the same offense as that charged in the second indictment, and upon which he has been tried and convicted, it by no means follows, as contended for by the counsel for the prisoner, that such verdict of acquittal forms a bar to the trial upon this indictment.

It is claimed by the plaintiff in error that his arraignment and trial upon this second indictment is an infraction of the 5th Article of the Amendment to the Constitution of the United States, which declares that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb." This provision is a fundamental maxim in criminal jurisprudence. It is derived from the ancient and well-established principles of the common law, was ratified by *magna charta*, and is now firmly established by our national constitution. When this principle is invoked as a bar to further proceedings in a criminal prosecution, the inquiry always arises, has the party in fact been already put in jeopardy for the same offense? To sustain the plea of a former acquittal, it must appear that the party was "put in jeopardy" by the former trial; thus, if the indictment upon which he had already been tried was so defective that no judgment could have been given upon it, it would not at common law constitute a bar (*People v. Barrett*, 1 *Johns.*, 66; 1 *Russ. on Cr.*, 836; *Burns v. People*, 1 *Park. Cr.*, 182).

Our Revised Statutes, however, provide that, "When a defendant shall have been acquitted of a criminal charge, upon trial, on the ground of a variance between

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the indictment and the proof, or upon any exception to the form or substance of the indictment, he may be tried and convicted upon a subsequent indictment for the same offense" (2 *Rev. Stat.*, 701, § 24). "But where a defendant shall have been acquitted upon trial, on the merits and facts, and not upon any ground stated in the last section, he may plead such acquittal in bar of any subsequent accusation for the same offense, notwithstanding any defect in form or in substance, in the indictment upon which such acquittal was had" (*Id.*, § 25). But such former acquittal will not be a bar, if the court had no jurisdiction to try the offense (1 *Russ. on Cr.*, 836), or if the jury had been discharged without rendering a verdict (*People v. Bowden*, 9 *Mass.*, 494; *United States v. Perez*, 9 *Wheat.*, 579), or if there has been a failure of the trial for any other cause (12 *Pick.*, 496). But the plea in the present case presents the ground of acquittal on the former trial in the very words of section 24 above quoted, viz: on the ground of a variance between the indictment and the proof. We are, therefore, admonished by this clear and explicit declaration of the statute, that an acquittal upon such ground forms no bar to a trial and conviction upon a subsequent indictment for the same offense. This plain provision of the statute law of the State disposes of the plea in bar interposed by the prisoner, and shows it was properly overruled.

It is claimed by the prisoner that both indictments were in fact for the same offense. But we deem it unnecessary to pass upon this question.

The judgment should be affirmed.

Concurring on the main question: WRIGHT, PORTER, HUNT, SCRUGHAM, and GROVER.

The question of having several forged bills in possession, etc., not passed upon.

Judgment affirmed.

BUTTON *against* McCAULEY.*Court of Appeals ; September Term, 1867.*

EVIDENCE IN ACTION FOR BREACH OF PROMISE.—MITIGATION OF DAMAGES.—PLEADINGS.—OBJECTIONS TO EVIDENCE.

In an action for breach of promise of marriage, declarations of the defendant that he would make a good home for the plaintiff, made at the time, and as part of his conversations with the plaintiff which are relied on as establishing the promise of marriage, are admissible, in connection with the other conversation, as tending to prove the contract.

Under a general denial, in such an action, evidence that the plaintiff drank intoxicating liquors to excess, and sometimes got intoxicated, although not competent as a defense to the action, is competent and admissible in mitigation of damages. Any misconduct showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation.

Under the general issue, in such an action, the plaintiff, in offering evidence which is competent in mitigation of damages, is not bound to specify that he offers it for that purpose. If the evidence is competent for any purpose, and is rejected, it is error, although not competent for other purposes in the action.

If the intoxication of the plaintiff was connived at by the defendant, the burden of proof is upon the plaintiff to show such connivance.

Appeal from a judgment.

This action was brought by Alceste Button against Emanuel McCauley, to recover damages for an alleged breach of a promise of marriage. The defendant's answer was a general denial of all the allegations of the complaint.

The cause was tried in 1861, at a circuit, in the seventh district.

The plaintiff was called as a witness in her own behalf, and her testimony tended to establish the fact of a contract of marriage between the parties. In testifying to such agreement, she stated conversations between them,

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in the course of which she said that he said he would make her a comfortable home. To this evidence the counsel for the defendant objected, as immaterial, irrelevant and incompetent. The objection being overruled, the witness proceeded to state that he promised to leave her well provided for; that he would build a house and fit it up nicely, and provide a team for her, &c.

Subsequently the defendant was examined as a witness in his own behalf, and besides testimony tending to contradict the contract of marriage, he offered to prove that the plaintiff, while she was living with him, drank intoxicating liquors to excess, and sometimes got intoxicated. This was a general offer, not made with reference, specially, either to a defense, or to mitigation of damages.

The court excluded this testimony, upon the objection of the plaintiff, and the defendant's counsel excepted.

The jury found a verdict for the plaintiff for \$500 damages, and the defendant's motion for a new trial was denied, and on appeal from the judgment rendered upon the verdict, the judgment was affirmed by the general term in the seventh district. The decision of that court is reported in 38 *Barb.*, 413.

The defendant now appealed from the judgment to the court of appeals.

T. R. Strong, for the defendant, appellant.—I. The proof of drinking and intoxication was competent. (1.) It would have established a full defense (*Sedgw. on Dam.*, 369; *Boddely v. Mortlock*, 1 *Holt*, 151; *Irving v. Greenwood*, 1 *Carr. & P.*, 350; *Palmer v. Andrews*, 7 *Wend.*, 142; *Foulkes v. Selway*, 3 *Esp.*, 236). (2.) The proof was proper in mitigation (*Johnson v. Caulkins*, 1 *Johns. Cas.*, 116; *Miller v. Stone*, 7 *Cow.*, 22; see, also, *Sedgw. on Dam.*, 210, 369; *Bennett v. Smith*, 21 *Barb.*, 447, and cases there cited; *Leeds v. Cook*, 4 *Esp.*, 257). (3.) It is no answer to this that the fact was not alleged in the answer. (a.) No ground of objection was stated, and therefore the objection should have been disallowed (*Jackson v. Hobby*, 20 *Johns.*, 357; *Elwood v. Diefendorf*, 5 *Barb.*,

406 ; *Camden v. Doremus*, 3 *How. U. S.*, 530 ; see, also, *Mallory v. Perkins*, 9 *Bosw.*, 577 ; *Ohio Ins. Co. v. Edmonstone*, 5 *Miller*, 295). (b.) If the ground had been stated, an amendment might have been made. (4.) The doctrine of the cases as to such evidence extends to dissolute conduct (*Webs.*, tit. Dissolute ; *Leeds v. Cook*, 4 *Esp.*, 256 ; 1 *Holt N. P.*). (5.) Mitigatory matter is not pleaded under the Code of Procedure (12 *How. Pr.*, 343 ; 14 *Id.*, 46 ; 24 *Barb.*, 614 ; 33 *Id.*, 283 ; 17 *Id.*, 561).

II. The evidence of defendant's promise to build a house, give plaintiff a comfortable home, &c., was improperly allowed.

W. F. Cogswell, for the plaintiff, respondent. — I. The statements in reference to the defendant's promises to make a good home for the plaintiff was competent and material, because it was a part of the conversation relating to the subject-matter of the action, and because it was a part of the inducement held out by the defendant which led the plaintiff to accept his proposition, and formed a part of the consideration of the contract.

II. The evidence of intoxication was not warranted by the pleadings, and therefore improper and irrelevant. (1.) It was not admissible under the general issue (*Archbold's N. P.*, 280-3 ; 7 *Cow.*, 635 ; 14 *Mass.*, 275 ; 7 *Metc.*, 86 ; 6 *Mass.*, 518 ; 3 *Pick.*, 378 ; 1 *Johns. Cas.*, 116 ; 2 *Cow.*, 811 ; 3 *Esp.*, 286 ; 3 *Mass.*, 546, 189 ; 4 *Wend.*, 114 ; 21 *Barb.*, 446, and cases there cited). (2.) The general character of the party cannot be impeached by particular facts or circumstances (2 *Phill. on Ev., Cow. & H. N.*, 952, and cases there cited ; 2 *Greenl. on Ev.*, § 424, note 5, p. 421, note 1 ; 10 *Serg. & R.*, 282).

GROVER, J.—The declaration of defendant to the plaintiff that he would make a good home for her, was competent evidence, in connection with the other conversation had at the time. It tended to prove the contract of marriage alleged by the plaintiff. The same may be said of his declaration to her, that he would build a brick house, and fit it up nice, keep a carriage, &c.

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The defendant offered to prove that the plaintiff, while she was living with him, drank intoxicating liquors to excess, and sometimes got intoxicated. The plaintiff objected to this proof. The objection was sustained, and the defendant excepted. The case is very brief, and does not fully show the evidence that had been given.

When this proof was offered, the fair intendment from the case is, that the defendant, although unmarried, had a family with which he lived; that the plaintiff lived with him, for a time, as housekeeper. That the courtship was had, and the promise of marriage was made, while she so lived with him. The plaintiff's counsel insists that the evidence was not admissible under the answer. The answer was a general denial only. Under this answer it is clear that the evidence offered was not competent as a defense to the action (*Code of Pro.*, § 149; *McKyring v. Bull*, 16 *N. Y.*, 297). It was admissible under the answer, in mitigation of damages, if competent for that purpose (*Travis v. Barger*, 24 *Barb.*, 614, and cases cited). I think the evidence was competent in mitigation of damages (*Palmer v. Andrews*, 7 *Wend.*, 142; *Willard v. Stone*, 7 *Cow.*, 22, and cases cited). In these cases the evidence related to unchaste and immodest conduct, and it was held competent, either in bar or mitigation, according to the particular facts established.

The reasoning of the court shows that any misconduct showing that the party complaining would be an unfit companion in married life, may be given in evidence, in mitigation of damages. It requires no argument to prove that habits of intoxication render the party addicted to them thus unfit.

It is insisted by the plaintiff's counsel, that the evidence being inadmissible under the pleadings as a defense, the counsel should have specified in his offer the purpose for which he proposed to introduce it. This position cannot be sustained. When there is an offer of evidence competent for any purpose in the cause, and the evidence is rejected, it is error, although not competent for other purposes in the action. In *Travis v. Barger*

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(*supra*), the ruling of the judge at circuit was sustained, upon the ground that it appeared that the evidence rejected was offered as a defense to the action, and that it was properly rejected as inadmissible, under the answer, for that purpose.

Under these circumstances, if the evidence is admissible for some other purpose, the counsel should specify such purpose. This is all that the case decides upon this point.

In the present case, the offer was general, and the ground of the rejection does not at all appear.

All that the case shows is, that competent evidence in mitigation of damages was offered and rejected, without anything showing the purpose of the offer or ground of rejection.

It is further insisted that the defendant may have induced the plaintiff to drink, or may have known of this habit, at the time of entering into the contract.

The answer to this is, that if such facts existed, it was incumbent upon the plaintiff to prove them. The defendant, in his offer, was not bound to negative them.

My conclusion is, that the judgment appealed from should be reversed and a new trial ordered.

All concurred in reversing the judgment, except PARKER and HUNT, JJ.

GARDNER *against* TYLER.

N. Y. Common Pleas ; General Term, January, 1868.

SUBSTITUTION OF ATTORNEYS.—MOTIONS AND ORDERS.

Where the court grant a motion for substitution of attorneys, on the application of a client, upon condition that the client pay the sum found by a reference to be due to the attorney, and the attorney, upon the sum being thus liquidated, tenders a substitution, with the papers in the ac-

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tion, demanding payment of such sum, the court should not compel the party to accept the substitution and pay, by proceedings for contempt.

Motion to compel compliance with a former order of the court.

In this action, which was brought by David L. Gardner against Julia E. Tyler, William Watson, the attorney for the plaintiff, was served, on the 30th day of August, 1867, with an order, made by one of the judges of this court, to show cause why R. W. Townsend should not be substituted in his place as attorney for the plaintiff. The motion was heard before Mr. Justice CARDOZO, who made an order that it be referred to a referee by him appointed, to determine and report the *amount due* to the said attorney from the plaintiff, for costs and disbursements and counsel fees in this action, and also in another action in favor of the plaintiff against said Julia E. Tyler, pending in this court; and that on the coming in and confirmation of the said report, and upon payment by the plaintiff of such amount as might be found due to the said Watson for costs, disbursements and counsel fees in this action, and in the other suit of Gardner v. Tyler aforesaid, the said R. W. Townsend be, and he hereby is substituted as attorney for the plaintiff in this action, and in the other action of Gardner v. Tyler, in the place of the said Watson. The reference took place in pursuance of the order, plaintiff appearing by counsel, and the attorney in person. The attorney submitted his bill for costs, disbursements and counsel fees, and witnesses were examined as to their value.

On the 12th of November the referee reported, that after hearing the proofs and allegations of the parties, he found that there was due from said plaintiff to the said William Watson, for costs, disbursements and counsel fees in this action, the sum of five hundred and sixty-two dollars and fifty cents, and in the other action of Gardner v. Tyler the sum of one hundred and fifty dollars and fifty cents.

A motion was made to this court subsequently by said Watson, for the confirmation of this report, and on the 16th day of December the report was, by order of the court, in all things confirmed.

Since the confirmation of the report, Watson, the attorney, served upon the said Townsend a copy of the order of confirmation, and at the same time tendered him consents for substitution in both causes, and demanded the amount reported by the referee as due him. Townsend refused to pay the amount, or take the substitution, and gave notice that the application for a substitution was abandoned. In fact, upon the argument of the motion for confirmation, plaintiff, through his counsel, formally withdrew his application for a substitution.

Watson then moved, at a special term, for an order that the plaintiff *absolutely pay to him*, as attorney of the plaintiff, within five days, the amount reported by the referee to be due him. His motion was denied, the following opinion being rendered thereon :

VAN VORST, J.—The plaintiff desired to change his attorney. He invoked the aid of the court for the accomplishment of this result. As was just to both attorney and client, a reference was ordered, to ascertain the amount due the attorney for his services, upon the payment of which, the substitution was to be made. After subjecting the attorney to the annoyance and trouble of a reference, and the loss of time and professional services to others incident to his attendance on the trial before the referee, and after prosecuting the proceeding until a report is made, he then abandons his application for a change of attorney, and refuses to pay the amount reported due. Unless the court had believed that the plaintiff's original application was made in good faith, and with the design of being carried out, it would not have aided him to a reference. An attorney is an officer of the court, and is entitled to its protection, and a court would not willingly make an order, the effect of which would be unnecessarily to harass or vex him in his business. A client has a right to change his at-

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torney, and the court will aid him to do so, in all cases, in a way to protect the interests of both. It will assist him to ascertain, in a summary way, the amount of the attorney's bill and lien. The client having put this proceeding in motion, which is special in its character, should feel himself under an obligation to carry it out. But I do not see that there is any power in the court to compel it to be done, upon the refusal of the client, and the withdrawal of his application for a substitution.

The court can oblige the party to pay the costs of the proceedings, as it does other litigators who come unnecessarily into court. Plaintiff has paid the fees on the reference, and has been ordered to pay the costs on the motion for confirmation of the report. But I do not see how any order can be made, or if made, how it could be enforced, compelling the client to pay the amount reported due to the attorney. The referee's report is confirmed, and the value of the attorney's services is fixed and determined by it. But it is not a judgment to be enforced by execution. If it was, this motion would be unnecessary. This report would, in any action to be brought by the attorney against his client for his services, doubtless fix the amount of recovery. And the report and confirmation of it might be made the foundation of an action in favor of the attorney against the client. If an order was to be made such as is asked for, it should be made, not in any special proceeding between attorney and client, but in this action, in which all papers on the various motions, including the present application, are entitled, and it would embrace for services in another action, between one of the parties to it and his attorney.

A refusal to pay the amount ordered would not render the plaintiff liable to the process of attachment or imprisonment. The amount due the attorney is for professional services, and is a debt only. There is no provision of law which would justify the issuing of an execution upon any such order. Executions are issued to enforce judgments, and to collect costs on motions (*Code*, § 283; *Laws of 1840*, 333, § 15; *Laws of 1847*, 491, § 2). An order such

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as is asked for in this proceeding would not be a judgment within the meaning of that term, nor would it be an order for the payment of costs. I have been referred by the attorney to the case of *Buzard v. Gross* (4 *How. Pr.*, 23) as an authority which would justify an order such as he asks for, and its enforcement by execution.

But there is nothing in that case which favors this application. The order directed to be made in that case was for the payment of the costs upon the denial of a motion for a new trial. These costs had not gone into the judgment with the general costs. An order was directed to be made that the unsuccessful party should pay the costs, and if not paid on demand, an execution should issue for their payment.

The present application before this court has no relation to the payment of costs between the parties to a suit. The attorney is not seeking to recover costs of his client, the amount of which have been fixed and determined by the court as such, but he is seeking to collect his claim for professional services. It is a simple debt or demand, the amount of which was liquidated by the referee, as the basis of an order for a substitution of attorney, which has not been carried out.

Motion denied, but without costs.

From the order entered accordingly, the promovent now appealed to the court at general term.

BY THE COURT.—BARRETT, J.—The facts are very fully stated in the opinion of the learned judge who presided at special term, and his conclusions are correct. The original proceeding was not against, but by, the client, to change his attorney and obtain possession of his papers. The reference was purely incidental, and its effect was simply to establish and advise the court of the extent of the attorney's lien. Upon the confirmation of the report the parties stood before the court precisely as though,

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upon the original hearing, there had been no disagreement as to the value of the services, or their proper amount had been determined upon the papers by the court itself. What, in either case, would have been the proper order? Clearly that the attorney deliver up the papers and furnish a substitution upon the payment of the precise amount of his conceded or thus ascertained lien. With that order, such an application is fully disposed of, and the power of the court ceases. It is urged, however, that the client, by coming voluntarily into the jurisdiction and accepting the reference, has submitted himself to any order which the court may see fit to grant for the protection of its officer from vexatious litigation. That is true, if by the too general and sweeping expression "any order" is meant any proper and lawful order. But he has not thereby conferred upon the court any additional power, or any novel jurisdiction. He certainly has not authorized it, on a mere motion without judgment, confession, or even the commencement of an action, to direct the payment of an ordinary debt; nor has he, by its non-payment, subjected himself to punishment as for a contempt. The fact of the creditor being an officer of the court gives him no higher or different *status* than any other creditor, nor do the labor and vexation attendant upon the proceeding entitle him to more summary or rigid processes than those pointed out by law for the enforcement of ordinary judgments. The rule contended for would prevent a party who has invoked even a favorable exercise of discretion from declining it, if granted conditionally; and would involve our compelling him, under pain of imprisonment, to accept the grace and to comply with the condition. It may be added that so far from having been vexed by fruitless litigation as charged, the facts would seem to justify the conclusion that the attorney has been the sole gainer by the proceeding. He certainly has, without expense to himself, the client having paid the referee's fees, obtained an adjudication reducing his previously unliquidated claim to a precise and definite sum, thus fixing the extent

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of his lien, and settling beyond further question his rights in respect to the suit and the papers.

The order appealed from should be affirmed, with costs.

Order affirmed.

ELIAS *against* FARLY.

Court of Appeals; March Term, 1867.

LEVY BY SHERIFF. — PREFERRED LIABILITIES.

The sheriff, with execution in his hands, went to the person having charge of the property, or who, with others, was in its apparent possession, and, in view and control of the goods, informed him that he levied on the goods, and indorsed a memorandum of the levy upon the executions.—*Held*, that this was sufficient as a levy, although the person in charge was the assignor, who disclaimed any interest in the goods, and no notice was given by the sheriff to the assignee.

If a debtor, making an assignment for benefit of creditors, prefers his landlord for rent of his dwelling, the assignment is void, if this be done with intent to secure the occupation of the dwelling-house for the benefit of himself and family, subsequent to the assignment, without paying rent or being liable therefor.

Appeal from a judgment.

This action was brought by Israel Elias and Aaron Elias against Benjamin Farly, sheriff of the county of Niagara. The defendant justified the taking by virtue of several judgments and executions against Samuel M. Weiner, claiming the goods seized to be the property of Weiner.

Upon the trial, the plaintiff read in evidence a general assignment for benefit of creditors from Weiner to one Baer, dated November 27, 1857, assigning the goods in question for the benefit of creditors. Among certain pre-

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ferred creditors mentioned, was George Judson, for rent, \$60. The defendant produced George Judson as a witness, who was asked whether Weiner was owing him last fall. Plaintiff's objection to the question was overruled, and the witness answered: "He owed me for rent; he hired a house of me May 5, 1857, for one year from that date, for \$2 per week, and was to pay me once in two weeks, or four weeks, as I wanted. I traded, and he paid me money, and I settled with him about November 1, 1857, and had received only \$40.78. Weiner occupied the premises with his family till about the last of April, 1858. His family and his goods were there till about then."

The court charged the jury, among other things, that if Weiner preferred Judson in the assignment, for the use and occupation of a dwelling-house before and subsequently to making the assignment, and, even though a *bona fide* liability, with intent that it should accrue to Weiner's future benefit by securing to himself and family the future use of the dwelling, without paying rent or being liable therefor, then the assignment was void.

To this charge the plaintiffs excepted, and requested the court to charge that there was no evidence tending to show that Weiner preferred Judson with such intent, which request the court refused.

The other facts, material to the points decided, are sufficiently stated in the opinion of the court.

P. L. Ely, for the plaintiffs, appellants;—reviewed the exceptions, and insisted that the unexpired term of the lease passed under the assignment, and the acts of the assignee under it, could not affect the validity of the assignment. It was the duty of the assignee to take possession of the property, and collect the rent. The fact that he failed to do so was not to be charged as evidence of fraud in the assignor (citing and commenting on *Mackee v. Cairns*, 5 Cow., 547; *Leitch v. Hollister*, 4 N. Y., 211; *Barney v. Griffin*, 2 N. Y., 335).

II. There was no levy within the established rules

(Booth v. Wells, 29 *N. Y.*, 671). The sheriff had notice of the assignment, and that the assignee was next door. The officer should have taken possession of the goods by manual acts; or if the levy was intended, it must be acquiesced in by those who are present and interested (Camp v. Chamberlain, 5 *Den.*, 198).

W. A. Butler, for the defendants, respondents.—I. As to the preference of the claim for rent,—cited and commented on *Murray v. Smith*, 1 *Duer*, 412; *Haggart v. Morgan*, 1 *Seld.*, 422; *McAllister v. Reab*, 4 *Wend.*, 483; *S. C.*, 8 *Id.*, 109; 2 *Rev. Stat.*, 137, §§ 1, 3, 5; *Mackie v. Cairns*, 5 *Cow.*, 547; *vide* pp. 567, 580; *Leitch v. Hollister*, 2 *N. Y.* [2 *Comst.*], 211; *Barney v. Griffin*, *Id.*, 365; *Goodrich v. Downs*, 6 *Hill*, 438.

II. As to the sufficiency of the levy,—*Connah v. Hale*, 23 *Wend.*, 466; *Wintringham v. Lafoy*, 7 *Cow.*, 735; *Reynolds v. Shuler*, 5 *Cow.*, 326; *Phillips v. Hall*, 8 *Wend.*, 610, 613; *Allen v. Crary*, 10 *Id.*, 349, and cases cited; *Wall v. Osborn*, 12 *Id.*, 40; *Fonda v. Van Horne*, 15 *Id.*, 633; *Butler v. Maynard*, 11 *Wend.*, 548; *Beekman v. Lansing*, 3 *Wend.*, 450.

HUNT, J.—Numerous exceptions were taken during the trial. Some of them are conceded by the appellants to be without merit.

I have examined them all with care, but do not think it necessary to discuss any of them, other than the exceptions taken to the charge of the judge. *Weiner* was a merchant in Lockport, and the owner of the goods in question. In November, 1857, he made an assignment to one *Baer*. The assignment was alleged to be fraudulent. Testimony was given upon this question, and the jury by their verdict decided that it was fraudulent. On the 23rd of January, 1858, the deputy sheriff made the levy under which the goods were afterwards removed and sold. It is in relation to the validity of this levy that the question is made. On the 26th day of January, *Baer* made a sale to the plaintiffs of all the goods remaining unsold, which

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sale, it is alleged, was also fraudulent. The deputy sheriff testified that, having these executions in his hands, he presented the same to Weiner at his store for payment; that he levied on the goods at that time; that he told Weiner of the levy at the time in the store, and that certain clerks named were also in the store. On being cross-examined, he further stated: "I made the levy on the 23rd day of January; I asked Weiner to turn me out property on the executions; he said he had no property; I told him I was authorized to levy on that stock of goods; I told Weiner I had made a levy on the stock of goods." On the same day he indorsed upon the execution, "Levied, January 23rd, on all the goods in the store lately occupied by S. M. Weiner." Baer, the assignee, was not present at this time.

In substance, the sheriff, with the executions in his possession, went to the person having charge of the property, or who, with others, was in its apparent possession, and in view and control of the goods, informed such person that he levied on the goods, and indorsed a memorandum of such levy upon the executions. No notice of the levy was given to Baer, the assignee. It was sufficient to give it to the person in charge. The jury have found that, as to creditors, the title was in Weiner, and not in Baer. No notice to Baer could have been necessary.

The plaintiffs' counsel requested the court to charge the jury that there was no evidence of a sufficient levy upon the goods to entitle the defendant to hold the goods. The court declined so to charge, and the plaintiffs excepted. The court charged the jury that it was not necessary for an officer to take manual possession of the goods, or to assume the entire control over property, to constitute a valid levy; that if the sheriff went into the store where the goods in question were, having in possession the executions, for the purpose of levying on the goods, and found Weiner in the store, apparently in possession, exhibited the executions to Weiner, informed him that he levied upon the goods, and he then levied and made a minute upon his executions, this constituted a sufficient

levy. To this the plaintiffs excepted. I am of the opinion that the evidence showed a sufficient levy, and that there was no just ground of exception to the charge (*Camp v. Chamberlain*, 5 *Den.*, 198 ; *Bond v. Willett*, 31 *N. Y.*, 102 ; *Roth v. Wells*, 29 *N. Y.*, 471). In the latter case, the rule is thus laid down by MULLIN, J. : "To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession of them, if that be practicable ; if not, then he must openly and unequivocally assert his title to them by virtue of his executions. It is not essential to the validity of the levy that he take actual possession of the goods, or that he remove them from the custody of the debtor. The test of a valid levy is whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution." In that case the defendant went to the plaintiffs' store, saw the goods, asserted his right to them by virtue of his levy, in the hearing of one of the plaintiffs, and subsequently the fact that a levy had been made was indorsed on the executions. (See, also, the explanation of the rule as given by SELDEN, J., at p. 488). The case of *Roth v. Wells* was elaborately argued, and the reported opinions show that all the authorities on the subject were before the court, and were carefully considered. It is a clear authority in favor of the defendant, and it is not necessary to go further in the citation of cases.

It appeared from the assignment of Weiner that a preference was given therein to one George Judson, to the amount of sixty dollars, for rent. On this branch of the case the court charged the jury that if Weiner preferred Judson for this sum for the occupation of the dwelling-house used by him, before and subsequent to the assignment, even though a *bona fide* liability, with intent that the same should accrue to Weiner's future benefit, by securing to himself and family the future use of said dwelling-house, without paying rent or being liable therefor, the assignment was void. To this charge the plaintiff excepted. The law of this proposition is clearly sound (2 *Comst.*, 365 ; 4 *Id.*, 211 ; 5 *Id.*, 547). The evidence from

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which the jury were authorized to draw the inference of the proposed intent, although not strong, was sufficient, I think, to raise the question.

These questions are the only ones requiring particular notice.

The judgment should be affirmed.

Judgment affirmed.

RITCHMYER *against* MORSS.

Court of Appeals; January Term, 1866.

REAL PROPERTY.—BUILDING BY TRESPASSER.

A building erected upon the land of one person by another person, without any authority or agreement in respect thereto, becomes a part of the realty, and passes with a conveyance of the land.

To take the case out of this principle, on the ground that the building was erected by a tenant for purposes of trade and business, it is not enough to show that it was occupied for the purposes of business, but the existence of the relation of tenant must be made out by express proof or clear implication, and it must also be shown that the building was erected by the tenant for the purposes of trade or business, and that he exercised his right of removal during the term.

Appeal from a judgment.

This action was brought by John G. Ritchmyer, respondent, against Benton G. Morss and others, appellants.

The facts are fully stated in the opinion of DAVIES, Ch. J.

S. L. Mayham, for the defendants, appellants;—cited and commented on the following authorities: *Smith v. Benson*, 1 *Hill*, 178; *Buckley v. Buckley*, 11 *Barb.*, 63; *Fisher v. Saffer*, 1 *E. D. Smith*, 611; *Mott v. Palmer*, 1 *N. Y.* (1 *Comst.*), 564; *Godard v. Gould*, 14 *Barb.*, 662;

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11 *Wend.*, 54; 1 *Cow. Tr.*, 3 ed., 322; *McLaughlin v. Waite*, 9 *Cow.*, 670; 13 *How. Pr.*, 219; *Dolsen v. Arnold*, 10 *How. Pr.*, 528; *Fitzgerald v. Alexander*, 19 *Wend.*, 402; *Small v. Smith*, 1 *Den.*, 583.

DAVIES, Ch. J.—The plaintiff claims in this action to recover the value of a certain building, located upon the lands of the defendants, which he claims as owner, and which was taken possession of and removed by defendants.

The building was erected by Mr. Vroman, in the fall of 1849, at which time the land upon which it was erected was owned by Alonzo C. Paige and others. It was a good frame building, as described by the plaintiff, 15 × 16 feet, 10-foot posts, nicely enclosed with pine siding, pine shingles, a good cornice on one end, painted white with two coats; one door outside, and one inside; two windows—one in the front end, and one in the side, and a window in the back end.

There was a partition in it lathed and plastered, counter and shelves in the front part of the building. The building stood on a foundation of loose stones with a back chimney in it. The plaintiff purchased it on the 21st of November, 1859, having previously occupied it for six years. The defendant removed it in December, 1860. The plaintiff testified he did not know by whose authority the shop was built there. Did not know for whose benefit Vroman built it. He did not know that Vroman occupied it as a tenant of anybody when he erected the building.

The defendants then proved that on the 16th day of June, 1860, they entered into a written contract with Paige and Potter, then the owners of the land upon which said building was located, and agreed to pay therefor the sum of \$2,500 on the execution of a good and sufficient deed therefor, and that the defendants took possession of said land under said contract; that they were in possession under that contract at the time the shop was removed; that there were several other buildings on this lot at the time

they bought, and the defendants took possession of the whole lot, and all the buildings, including this shop ; that the defendants subsequently received a deed for said premises, pursuant to the terms of their contract ; that the defendants have occupied all the premises since the contract to them.

The judge charged the jury that, as matter of law, the plaintiff was entitled to recover. To which charge the counsel for the defendants there and then duly excepted. The judge further charged that the only question for the jury to consider was the question of damages, and to this the defendants also excepted.

I think the learned judge at the circuit was in error in holding, as a matter of law, that upon this testimony the plaintiff was entitled to recover. That testimony showed, in brief, that the plaintiff had become the purchaser of a building erected upon land owned by the defendants, and that the defendants had taken possession of the building and removed it, as they clearly had a right to do if it was attached to the freehold, and passed under the contract and conveyance to them. That it did so pass is established by authority (*Mott v. Palmer*, 1 *N. Y.* [1 *Comst.*], 564). In that case Judge BRONSON said : "The word land includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. This is but common learning ; and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mines and quarries in the ground."

The cases relied upon to take this case out of this well-recognized and firmly-established rule of law, do not apply to the facts as proven on the trial of this action.

In the first place, it was not established that this building was erected upon any agreement between Vroman and the then owners of the fee of the land, that it was to be considered strictly a personal chattel. Second, it was not proven that the building was erected by a tenant, for the purposes

of his trade and business, or that the relation of landlord and tenant ever existed between Vroman and the defendants' grantors, or between them and the plaintiff. The first proposition was necessary to be established to make applicable the doctrine of the case of *Smith v. Benson* (1 *Hill*, 176). In that case, COWEN, J., said: "Thus both parties agreed to consider it (the building in question) as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremovable. *Prima facie*, such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them by an express agreement. They have in effect stipulated that the placing this building on the ground should work nothing more toward changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainderman; and surely, the parties may, by express agreement, do the same thing, and even more."

Equally inapplicable is the doctrine of *Ombony v. Jones* (19 *N. Y.*, 234), as the second proposition above stated was not established by proof. The rule to be gathered from the case is there stated thus by Judge GROVER: "That a tenant may remove, during his term, all erections made by him for the purpose of trade that can be removed without injury to the land, or something attached thereto."

But in the case at bar no tenant sought to exercise such right during his term. There is an utter failure to establish the first foundation for invoking the aid of such a principle, viz: that the relation of tenant at any time existed. When that fact was proven, it then would have been needful to show that the building in question was erected by the tenant for the purposes of trade or his business, and that he exercised his right of removal during his term.

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Upon the facts proven upon this trial, there can be no doubt that the defendants were the owners of the building in controversy, and it follows that the plaintiff is not entitled to recover its value. The learned judge erred in charging the jury that, as a matter of law upon the facts proven, the plaintiff was entitled to recover.

The judgment must be reversed, and a new trial ordered ; costs to abide the event.

PARKER, J.—If the building in question is to be deemed to have been a part of the realty, the plaintiff was not entitled to recover for its appropriation by the defendants.

It is undisputed that Vroman, who built it, was not the owner of the land on which it was built, either in fee or as a tenant for life or years ; nor is there any evidence tending to show that he built it pursuant to any agreement or understanding whatever with the owner of the land. So far as appears, he was a trespasser in erecting it upon the land where it was placed.

Under this state of facts, there can be no doubt that it became, when erected, a part of the land on which it was erected, and thenceforth real and not personal estate (*Smith v. Benson*, 1 *Hill*, 176 ; *Miller v. Plumb*, 6 *Cow.*, 665 ; *Ford v. Cobb*, 20 *N. Y.*, 344 ; *Murdoch v. Gifford*, 18 *N. Y.*, 28 ; *Snedeker v. Warring*, 2 *Kern.*, 170 ; *Ombony v. Jones*, 19 *N. Y.*, 234). It was sufficiently fixed to the freehold (*Smith v. Benson*, *supra* ; *Goodrich v. Jones*, 2 *Hill*, 142 ; *Bishop v. Bishop*, 11 *N. Y.*, 123 ; *Mott v. Palmer*, 1 *Comst.*, 564).

There can be no doubt that as between vendor and vendee it would be held to be real estate, and pass by the deed of the land. The same rule must apply as between these parties.

Nothing occurred after the erection that changed the property from real to personal. All that the plaintiff swears to in reference to his interview with defendant Reed, comes far short of producing such effect. It may be said that it shows an admission that plaintiff was en-

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titled to pay for the building. If any admission is shown, it is not that plaintiff was entitled to pay from defendants, but from their grantors, which was equivalent to a claim of ownership, as between defendants and such grantors.

What the plaintiff says he told Luman Reed in regard to his conversation with John Reed, is no evidence of such conversation with John, for he does not testify that he said it.

I am unable to see any legal ground to recover, and am of the opinion that the judgment appealed from should be reversed, and a new trial ordered.

All concurred, except PORTER, J.

Judgment reversed.

*Overruled
Sabb. day. 1-13;
42 May 243.*

PRENTICE *against* WILKINSON.

New York Common Pleas, General Term; June, 1868.

COSTS.—PROMISE OF THIRD PERSON TO PAY ON DISCONTINUANCE.

The promise of a third person to an attorney in an action for divorce, to pay his fees on condition of his discontinuing the action and a motion for alimony, pursuant to a settlement agreed upon by the parties, is not a promise to answer for the debt, default or miscarriage of another, under the statute of frauds, but is an original undertaking upon which an action will lie.

Appeal from a judgment.

This action was brought by Augustus Prentice against Byron J. Wilkinson, to recover the fees of the plaintiff,
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an attorney, upon a promise made under circumstances stated in the opinion of the court.

Stewart, Rich & Woodford, for the defendant, appellant.

The Respondent, in person.

DALY, F. J.—The plaintiff was the attorney of a Mrs. Wilkinson in an action brought by her against her husband, who is the defendant's brother, for a divorce. The plaintiff had made an application upon her behalf to the court for alimony, and, while this application was pending, Mrs. Wilkinson, her husband, and the defendant met at the plaintiff's office, and, after considerable negotiation, the suit was settled; Mrs. Wilkinson agreeing that the plaintiff should discontinue it, upon the defendant's promise to pay the plaintiff \$75 in liquidation, as it was expressed, of the plaintiff's services in the prosecution of the action.

The motion for alimony was accordingly abandoned, and the suit was discontinued.

This was not a promise to answer for the debt or default of another, but was a direct promise to pay to the plaintiff a certain sum of money for an object to be effected, and which constituted the consideration for the promise, namely, the settlement and discontinuance of the suit. It does not appear whether it was made directly to the plaintiff or to Mrs. Wilkinson, nor is it material; for if made to the latter, it was for the plaintiff's benefit, and was in either case an original and not a collateral undertaking (*Farley v. Cleavland*, 4 Cow., 433; 9 *Id.*, 639; *Lawrence v. Fox*, 20 N. Y., 270; *Schemerhorn v. Vanderheyden*, 1 Johns., 140).

The judgment should be affirmed.

BRADY, J.—There had been "considerable litigation" in the action between Henry W. Wilkinson and Susan E. Wilkinson, which was commenced, to obtain a divorce, by Mrs. Wilkinson. The plaintiff was her attorney. The

parties settled the motion for alimony, and the action was discontinued; and by the discontinuance the plaintiff gave up whatever lien he had acquired, and whatever counsel fee would have been awarded. In consideration of the settlement, the defendant made the promise relied upon by the plaintiff to warrant a recovery in this action. It is evident, from the return, that the compensation which ought to be given the plaintiff for his professional services was the subject of conversation before the settlement was agreed upon, and that its payment was a preliminary to the accomplishment of such settlement. The defendant in the divorce suit was not, at the time of the settlement, indebted to the plaintiff in this suit. The latter had an inchoate claim, resting upon the almost universal practice of allowing the wife, when plaintiff in a divorce suit, a sufficient sum to employ counsel to conduct her case; and the plaintiff, by consenting to discontinue, yielded his right to apply for it against the defendant in that suit. That was a sufficient consideration to support the promise of the defendant in this action as an original promise. The inchoate right of costs and counsel fee against the defendant, in the divorce suit, was extinguished by the discontinuance of the action, and is lost. It has frequently been held that a promise by a third person, accepted in lieu of a debt, which is, in consequence of such promise, discharged absolutely, is a new undertaking, and not within the statute of frauds.

The judgment should be affirmed.

BARRETT, J. (dissenting).—It is not pretended that the plaintiff was expressly retained by the defendant to procure a settlement of the action pending between H. W. Wilkinson and wife; nor is the fee claimed for any direct service rendered to the defendant. On the contrary, the plaintiff admits that his present claim is for the service rendered in the divorce suit; that the defendant promised to pay the amount “on report of said settlement,” and in consideration thereof; and that his fees were not spoken of until the matter was being closed.

This, to my mind, was a collateral, and not an original promise, within the principles enunciated in *Mallory v. Gillet* (21 N. Y., 412). It was the verbal promise of a third person, in consideration of the settlement between the husband and wife, to pay the fees due to the wife's counsel. Such a promise does not come within the third of those three classes into which Chief Justice KENT (*Leonard v. Vredenburg*, 8 *Johns.*, 29) divided the cases under the statute. There must be a "new or original consideration of benefit, or *harm moving between the newly contracting parties.*" Here, there was neither harm to the plaintiff nor benefit to the defendant. It does not appear that the plaintiff relinquished anything, or was in any wise affected by the settlement. But, even if he had abandoned, say a valuable lien upon the papers in his hands, or had lost the right of invoking the court's assistance to compel the defendant to pay a counsel fee, that would still be insufficient. To take the promise out of the statute, the original debt must be extinguished, or the consideration, even when founded upon *harm to the promisee*, must be *something moving to the promissor* (*Mallory v. Gillet*, *supra*; *Farley v. Cleveland*, 4 *Cow.*, 432). It cannot be said that the new undertaking was accepted as a substitute for the original demand; for the latter, such as it is, remains in full force. The claim against the wife, if valid, has not been released; if invalid, it would not support the promise. As to the right to apply for a counsel fee, that is not an original debt or demand, the extinction of which takes the case out of the statute. It is not an existing or vested demand, until the order for its payment is made. And who can say that it would have been granted? A state of facts can be conceived of which would justify its refusal; or a less sum than that claimed might have been awarded. There is no distinct proof that an application for a counsel fee was pending, or that the action itself has been discontinued. All that is said upon the latter head is, "that the motion for *alimony* was discontinued, and the matter *dropped*;" so it is by no means clear that the right of applying for compensation has been lost. The

testimony, as will be seen, was exceedingly meagre, and we are asked to sustain the judgment, not by inference, however strained, to be drawn from the facts proved, but by supplying other and independent facts, which were wholly unproved, and the existence of which must be purely a matter of conjecture.

Again, the plaintiff himself distinctly bases the promise upon the settlement between the husband and the wife; and nowhere intimates that his aid in the negotiations, or his consent to a discontinuance, or to a waiver of his right to apply for a fee, was spoken of, or referred to, or formed, in any manner, the consideration for the promise. It was, therefore, a mere naked promise, based upon a consideration moving between third parties, and not between either the creditor and the debtor, or the creditor and the promissor.

In *Tomlinson v. Gill* (6 *Ad. & Ell.*, 564), the defendant had promised to pay the costs due to a solicitor, by his client, the plaintiff in a pending chancery suit, in consideration of its discontinuance. The promise was held to be void, for the reason that no new consideration arose from the discontinuance; and that something must not only be given up by the promisee, but be *acquired* by the promissor. This was a stronger case than that under consideration, from the fact that the promissor was himself the defendant in the chancery suit, and might be said to have been benefited by its discontinuance; while here he was a stranger to the litigation.

For these reasons, I am constrained to differ with my brethren, and I think the judgment should be reversed.

Judgment affirmed.

ROYAL INSURANCE COMPANY *against* NOBLE.

New York Common Pleas, Special Term; April, 1868.

TESTIMONY OF HUSBAND AND WIFE. — MOTIONS AND ORDERS.—DISSOLVING ATTACHMENT.

Although the evidence of husband or wife is receivable, in a collateral proceeding, for the purpose of proving any fact material to the issue, it can not be admitted, in any proceeding whatever, for the sole and direct purpose of impeaching the testimony of the other.

Where the right to an arrest flows directly from the nature of the cause of action itself,—*e. g.*, in an action for the wrongful conversion of personal property,—the court will not try the merits upon affidavits, and will not discharge the order, unless defendant makes out a clear case of innocence.

It is no reason for dispensing with this rule, that the calendar is so crowded that the case may not be reached for a trial on the merits for a long time; and that, meanwhile, the defendant, being unable to procure bail, is imprisoned. In such a case, the court of common pleas will advance the cause upon the calendar, so as to give an early trial.

The rule that the testimony of an accomplice, though to be received with caution, may, even when unsupported and uncorroborated, sustain a conviction,—applied in the case of weighing the evidence presented by affidavits for an order of arrest in a civil action.

An attachment issued as a provisional remedy, under the Code of Procedure, cannot be dissolved as to a part of the property merely, upon giving security as to such part, under sections 240 and 241 of the Code. An application for a discharge, upon the undertakings specified in those sections, must relate to the whole of the property levied on.

This was an action for the alleged wrongful conversion of bonds belonging to the plaintiff. The defendant was arrested upon affidavits, among which was one made by his wife, from whom he had been separated; and his property, both real and personal, had been levied on by the sheriff, under an attachment issued as a provisional remedy, under the provisions of the Code.

I. *April*, 1868. Motion to vacate order of arrest.

The defendant offered the affidavit of one King, for the purpose of impeaching the character of his wife, from whom he was separated, and whose affidavit had been read by the plaintiff in opposition to the motion.

It appeared that the defendant had been arrested criminally for alleged complicity in the robbery of the plaintiff's bonds, upon which the charge of a felonious conversion is made in this action ; and that after a full examination he had been discharged by the magistrate. It also appeared that an indictment subsequently found for the same alleged offense had been quashed by the city judge.

The testimony of the alleged accomplices, who made the affidavits against the defendant upon this motion, referred to in the following opinion, was not adduced, either before the police justice or the grand jury. It also appeared that the defendant had been unable to procure bail, which had been fixed at \$100,000, and that he was actually confined in jail.

BARRETT, J.—I am still of the opinion that the facts stated in the affidavit of King are inadmissible. The evidence of husband and wife is undoubtedly receivable, in a collateral proceeding, for the purpose of proving any fact material to the issue ; and that, although the facts so testified to by the one may tend to criminate or contradict the other (1 *Greenl. on Ev.*, § 342, and cases cited ; 1 *Phill. on Ev.*, 7 ed., 80 ; *Id.*, *Cow. & H.'s Notes*, part 1, p. 71, and cases cited). The *fact* is admitted as bearing upon the issue, and that without reference to its tendency ; but there is no authority for admitting either husband or wife, in any proceeding whatever, for the sole and direct purpose of impeaching the other's testimony.

II. The rule is now so well settled, especially in this court, as not to admit of discussion, that where the right to an arrest is not collateral to, but flows directly from, the cause of action itself, the court will not try the merits

upon affidavit, and will not discharge the order, unless the defendant clearly makes out such a case as would entitle him upon the trial to a nonsuit, or to a directed verdict in his favor (*Solomon v. Waas*, 2 *Hill.*, 179; *Geller v. Seixas*, 4 *Abb. Pr.*, 103, affirmed at general term; *Bedell v. Sturta*, 1 *Bosw.*, 634; *Cousland v. Davis*, 4 *Bosw.*, 619, affirmed at general term; *Levins v. Noble*, 15 *Abb. Pr.*, 475; *Frost v. McCargar*, 14 *How. Pr.*, 131; *Barrett v. Gracie*, 34 *Barb.*, 20; and see *Jananique v. De Luc*, 1 *Abb. Pr. N. S.*, 420; *Huelet v. Reyns*, *Id.*, 27, and *Ely v. Mumford*, 47 *Barb.*, 629, where the rule is referred to and approved of*). Now the more I consider the exceedingly voluminous and conflicting affidavits presented—and they have received the most careful and exhaustive consideration—the more irresistible is the conclusion that the opposition to this application brings itself clearly and directly within the principle laid down in these numerous cases. Indeed, it was conceded by the learned counsel for the defendant, that the present facts, if adduced upon the trial, would entitle the plaintiff to go to the jury; but he insists that the weight of evidence is so clearly with him, that the arrest should not be upheld, even upon the assumption that a nonsuit could not be granted, and that a verdict could neither be directed for the defendant, nor set aside if rendered for the plaintiff. This, however, would still involve the trying of the merits, the guilt or innocence of the defendant, upon affidavits, and it is fully covered and prohibited by the authorities which so firmly establish the rule to which I have referred.

III. It will not be necessary to consider the effect of the discharge of the defendant by the police magistrate, or of the subsequent quashing of the indictments by the city judge, for the reason that the plaintiff, upon the present application, has adduced additional evidence to that which formed the basis of such previous judicial action. Without going through the immense mass of testimony, or attempting to particularize the points which have been

* The same rule has more recently been discussed and applied in the case of *Merritt v. Hecksher*, 50 *Barb.*, 452.

more fully developed, it will be sufficient, as an instance of one prominent feature presented for the first time, to refer to the affidavit of the alleged accomplice, Griffin. He distinctly states that the robbery was planned and perpetrated by himself in concert with the defendant and one Knapp. Of course I need scarcely say that such testimony is received with extreme caution; but yet it is well settled that a conviction may be sustained upon the unsupported and uncorroborated testimony of an accomplice (1 *Greenl. on Ev.*, § 380; 1 *Phill. on Ev.*, *Cow. & H.'s* ed., 37; 1 *Chit. Crim. L.*, 604; *Dunn v. People*, 29 *N. Y.*, 523; *People v. Dyle*, 21 *Id.*, 578; *Haskins v. People*, 16 *Id.*, 344; *People v. Costell*, 1 *Den.*, 83; *Wixson v. People*, 5 *Park. Cr.*, 119). The weight to be given to such evidence rests exclusively, under proper instructions, with the jury, whose legitimate functions should not be usurped, directly or indirectly, and the absolute freedom of whose judgment should not be impaired by any preliminary criticism upon the facts. It is for these reasons that I have so carefully refrained from expressing any opinion upon the merits, which could be used upon the trial by either party to the detriment of the other.

IV. The defendant asserts that he is ready and even anxious to submit to the ordeal of a jury trial, and he complains that owing to the crowded condition of our calendar, his case may not be reached for over a year, and that in the mean time he is subjected to close confinement. This complaint is just, and should be remedied by affording the defendant a speedy trial. The order of arrest and the imprisonment thereon are not to be permitted to operate as a punishment in advance of conviction. They are a mere guarantee for the presence of the defendant, and for his submission to final process. I have conferred with my brethren upon this subject, and they inform me that it is the common practice of this court, when a party is confined from inability to procure bail, to advance his cause upon the calendar, and thus avoid the protracted imprisonment consequent upon the ordinary delay.

V. The motion must, therefore, be denied; but the de-

fendant may, upon the settlement of the order, incorporate a provision advancing this cause upon the calendar, and setting it down specially for trial upon the first day of the next term.

II. *October, 1868.* Motion by defendant for an order releasing a sum of money attached by the sheriff, upon an attachment issued in this action contemporaneously with the order of arrest.

It appeared that the sheriff had attached other property, both real and personal, belonging to the defendant, respecting which no application was made.

BARRETT, J.—An attachment can only be discharged in accordance with the provisions of sections 240 and 241 of the Code. These sections prescribe but two modes of procedure. *First*, The defendant may have the attachment absolutely discharged, upon furnishing a proper undertaking in double the amount claimed. *Second*, He may have an appraisal of the property which has been attached, and obtain its release upon an undertaking in double its appraised value. There is no authority for the release of separate parcels. The remedy is confined to the discharge of the attachment itself, or the release of "the property attached." These words are plain. The property attached is all that which has been seized; and the construction contended for would supply the words, "or such part of the property attached as the defendant may desire to release." It was never intended to permit a defendant to choose what property he would withdraw, and what he would leave subject to the attachment.

Besides, the practical effect is against such a construction, for were an application like the present to be granted, the defendant might apply to-morrow, upon another small undertaking, executed by the same sureties, or by others, who perhaps could not justify in double the aggregate of the two undertakings, for the discharge of other property. In this manner, whether by the subdivision of one large undertaking into many small ones, to suit the exigencies

of a justification by but two sureties ; or by the substitution of numerous sureties of small means for the two of large, which a single undertaking would demand ; it is palpable that all the property attached might be withdrawn, and that too, with perfect regularity, upon wholly insufficient or greatly lessened security.

The application must be denied.

ROSEBROOKS *against* DINSMORE.

Court of Appeals ; January Term, 1867.

EVIDENCE.—ACTION AGAINST CARRIER.—VARIANCE.

In an action against a carrier, under a complaint which alleges that before the arrival of the goods at their original destination the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and so negligently acted that the goods were lost,—evidence that when the property had reached its destination the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, the carrier—will sustain a recovery, there being no objection taken at the trial to the variance.

An objection at the trial might be obviated by amendment.

Appeal from a judgment.

This action was brought by Henry W. Rosebrooks, plaintiff (and respondent), against William B. Dinsmore, president of Adams Express Company, defendant (and appellant), to recover the value of goods shipped for plaintiff by the defendants in the fall of 1862, from New York, to a consignee (Cantwell) at Harper's Ferry, Virginia.

The complaint, after alleging that the defendants were a joint-stock company, and Dinsmore the president thereof, proceeded as follows :

“ That between the 24th day of October, 1862, and the 1st day of November, 1862, Butler H. Bixby, Francis M.

Bixby and John C. Mather, who were, and still are, co-partners in business in the city of New York, shipped from the city of New York a large quantity of goods, wares and merchandise, hereinafter particularly described, by said Adams Express Company, directed to one William Cantwell, at Harper's Ferry, in the State of Virginia.

"That the said goods, wares and merchandise were of the worth and value of the sum of twelve hundred and twenty-four dollars, and are described as follows: [*specifying the goods.*]

"That said goods were received by said Adams Express Company, and by them agreed to be forwarded to said Harper's Ferry, and the same were actually forwarded to Harper's Ferry by said Adams Express Company.

"That said Adams Express Company received as a consideration for forwarding said goods as aforesaid, the sum of forty-seven dollars and forty cents.

"That said Butler H. Bixby, Francis M. Bixby and John C. Mather, at the time of the shipment of said goods, wares and merchandise were the owners thereof, and so continued to be owners of said goods, wares and merchandise, until their loss or destruction, as hereinafter more particularly described.

"That before the arrival of said goods at Harper's Ferry, said William Cantwell, the consignee thereof, had removed from said Harper's Ferry, of which removal said Adams Express Company was duly notified; and thereupon said Adams Express Company were duly notified and directed to forward said goods to the address of said William Cantwell, at the city of Washington aforesaid.

"That said company accepted to forward said goods to Washington as aforesaid, but instead thereof, said company so negligently acted in the premises at Harper's Ferry aforesaid, that said goods, through the negligence and improper care of said Adams Express Company, were wholly lost or destroyed.

"That said Butler H. Bixby, Francis M. Bixby, and

John C. Mather, on the sixth day of November, 1863, and after the destruction and loss of said goods, wares and merchandise, as aforesaid, duly assigned, for a valuable consideration, their claim against said Adams Express Company growing out of the matters hereinbefore set forth, to the plaintiff in this action, who now owns and holds the same.

“Wherefore, &c.”

Upon the trial before the referee, it appeared that a portion of the goods arrived at Sandy Hook, a place about a mile from Harper's Ferry, on the opposite side of the river, and, shortly after, the consignee demanded the goods there of the agent of the defendants, who refused to deliver them. The referee reported in favor of the plaintiff for the value, at Harper's Ferry, of the goods so demanded, with interest. Judgment was entered on the report accordingly, with costs. From this judgment the defendants appealed to the general term of the superior court, in which the action was brought, who reversed the judgment, and ordered a new trial, on the ground that the evidence amounted to a variance, leaving the cause of action unproved in its entire scope and meaning.

The decision of the court is reported in 4 *Rob.*, 672.

From their order the plaintiffs now appealed to the court of appeals.

Torrance & Spaulding, for the plaintiff, appellant;—cited *Belknap v. Sealey*, 14 *N. Y.*, 144; *Parsons v. Suydam*, 3 *E. D. Smith*, 280; *Manice v. Brady*, 15 *Abb. Pr.*, 173; *Day v. Roth*, 18 *N. Y.*, 448; *Stevens v. Boston & Maine R. R. Co.*, 1 *Gray*, 277.

Clarence A. Seward, for the defendant, respondent.—I. If the gravamen of the complaint was,—(1.) Neglect to forward the goods from Harper's Ferry to Washington; and (2.) Negligence and improper care of the goods at Harper's Ferry, whereby the goods were destroyed,—then the plaintiff entirely failed to prove his case, and the

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referee erred in not dismissing the complaint. There was not a particle of proof of any neglect of duty at Harper's Ferry, or of any request or agreement to carry the goods from Harper's Ferry to Washington. The complaint remained unproved in its entire scope and meaning, and, under section 171 of the Code, the complaint should have been dismissed for a failure of proof. The referee has rendered judgment, not for a refusal to forward, nor for neglect of the care of the goods at Harper's Ferry, both of which charges were based upon contract, but *ex delicto*, for a conversion of some of the goods at Sandy Hook. This he could not properly do (*Bailey v. Ryder*, 10 *N. Y.*, 363; *Voorhies' Code*, § 171, and cases cited in notes; *Saltus v. Genin*, 3 *Bosw.*, 250; *Whitcomb v. Hungerford*, 42 *Barb.*, 177; *Cowenhoven v. City of Brooklyn*, 38 *Id.*, 9; *Gaspar v. Adams*, 28 *Id.*, 441). The case was not one of a simple variance, nor one authorizing an amendment or a conformation of the complaint to the facts proved. There was an entire failure of proof, and the plaintiff should have been nonsuited. But, if the case was one of variance, an amendment should not have been allowed without putting the plaintiff to his motion, because the variance was material, and misled the defendant. To spring a trap upon the defendant in a final report, without giving him an opportunity to show how he had been misled, was not according to the defendant his legal rights. He came to try the allegations of his neglect at Harper's Ferry, and his neglect to transport the goods from Harper's Ferry to Washington. He did not come prepared to try the question of his conversion of the goods at Sandy Hook. No such issue was made. He was invited to no such repast. He had not fortified himself with evidence as to what transpired at Sandy Hook. Under the circumstances of the case, there is warrant for saying, that if the complaint had been for the conversion of the goods at Sandy Hook, the defendant could have proved that Cantwell, who demanded the goods at that place, assented to the reasonableness of the demand for the receipts, and promised to procure them, and assented

to the retention of the goods until the receipts were produced. This suggestion is supported by the fact that Cantwell sent for the receipts, and they were forwarded to him. If he promised to procure the receipts, and assented to the retention of the goods until the receipts were produced, then the detention of the goods at Sandy Hook was not a conversion. The defendant was misled by the complaint into believing that no such proof would be required, and hence did not attempt to provide it. Giving judgment against him, therefore, upon the ground of a conversion at Sandy Hook, was giving judgment against him upon a cause of action as to which he had no opportunity to defend himself; and the judgment should, for that reason, be reversed.

II. There was no conversion of the goods at Sandy Hook. Cantwell was the agent of the shippers, and had no interest in the goods.

III. The referee erred as to the measure of damages. The proper rule is, to give such damages only as will put the owner *in statu quo*. There are various portions of the evidence tending to show a violation of this rule.

IV. The damages on the other two shipments should be reduced.

SCRUGHAM, J.—The gravamen of the action is the loss of the property through the negligence of the defendant.

The agent of the plaintiff's assignor had the right to demand and receive it, when he applied for it at Sandy Hook; the property was not then *in transitu*, but had reached its destination, as the contract was to convey it to Harper's Ferry, or to the defendant's agency nearest or most convenient to it. Such was Sandy Hook, and the goods could not at that time be taken farther by the defendant.

The agent of the plaintiff's assignor was authorized by the defendant's agent at Harper's Ferry to apply for the goods at Sandy Hook.

The refusal to deliver them was wrongful, and its re-

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sult was their loss. The wrong would not have been committed but for the negligence of defendant in not sending a proper way-bill.

The box of candies was delivered, by mistake of defendant's agent, to the wrong persons, and lost to plaintiff's assignor.

There can be no doubt of this being attributable to defendant's negligence.

It was not claimed on the trial that the case proved varied from that pleaded; nor was any of the evidence objected to on the ground that it did not correspond with the allegations of the complaint.

If that objection had then been taken, the referee might have permitted an amendment of the complaint, and if the defendant alleged surprise, might have imposed terms to prevent it. It was late for the defendant to be surprised after report.

The order granting a new trial should be reversed, and the judgment entered on report of referee affirmed.

Judgment accordingly.

GOODWIN *against* SHARKEY.

New York Common Pleas; Special Term, March, 1868.

ARREST.—BANKRUPT LAW AND STILWELL ACT.—CONFLICT OF JURISDICTION.—FRAUDULENT CONVEYANCES.

Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder.

The bankrupt, therefore, cannot be arrested in proceedings under the act of

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1831, of this State, known as the "Stilwell act," by a creditor seeking to reach the property of the bankrupt.

The primary object of civil proceedings under the Stilwell act is, not the punishment of the debtor, but the collection of the creditor's judgment; and therefore such proceedings are in direct conflict with the bankrupt law, as respects all property which passed to the assignee in bankruptcy.

Motion to quash a warrant.

These proceedings were taken by William H. Goodwin against M. D. L. Sharkey.

The facts are sufficiently stated in the opinion of the court.

John E. Burrill and *Messrs. King & Lathrop*, for the prisoner.

William Fullerton, *A. J. Vanderpoel*, and *C. A. Arthur*, for the creditor.

BARRETT, J.—Sharkey was arrested under a warrant issued by me on the 28th ult., pursuant to the provisions of the act of April 26th, 1831, commonly known as "the Stilwell Act." Upon being brought before me, he moved to quash the warrant, principally upon the ground that, before it was issued he had applied for a discharge under the bankrupt law, had been thereupon adjudicated a bankrupt, and that his proceedings had progressed so far as the appointment of an assignee and the usual conveyance to that official of the estate of the bankrupt.

The acts complained of, and which constitute the foundation for the warrant, consist of the fraudulent disposition of real estate prior to the passage of the bankrupt law. It was claimed, on behalf of the complainant, that these proceedings under the act of 1831 should neither be dismissed nor suspended because of the bankrupt law or the proceedings thereunder, for the reason that the purpose of the State act is, as its title indicates, to *punish the fraudulent debtor*, as well as to obtain in a summary manner the assignment of his property. I cannot assent to this proposition.

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The punishment of the fraudulent debtor contemplated by the act, consists in his conviction of a misdemeanor under section twenty-six. By that section, the fraudulent disposition of property, the very act complained of here, and which entitles the creditor, under the previous sections, to this warrant, is made criminal, and is punishable as such. The arrest under the warrant issued by the civil tribunal is not for the direct purpose of punishing the fraudulent debtor. It is a civil proceeding in aid of the collection of the judgment. The act of arresting and imprisoning the debtor may of itself be said to be a punishment. If so, that punishment is merely incidental, and is only the weapon whereby the direct purpose, which is the disclosure and assignment, in a fair and just manner, of the debtor's property, are compelled and enforced. And such is the purpose of the act, even where the proceedings are based upon a fraudulent disposition of property, which, by the debtor's own wrongful act, has passed beyond his control, and which he has thus become unable to effectually assign. The imprisonment and punishment consequent thereupon, may, in that case, be the sole result of the proceedings; that is, the sole practical result; and yet, however protracted, they are still the means rather than the end. It is true that section eleven refers to persons, committed under the act, as remaining in custody in the same manner as "other prisoners in criminal processes;" yet it has been held that notwithstanding this language, these proceedings are not criminal in their character, but a summary, civil remedy, to enforce the collection of a debt, and more analogous to those in chancery than in a court of law (*Moak v. De Forrest*, 5 *Hill*, 605; *People v. Underwood*, 16 *Wend.*, 546; *Spencer v. Hilton*, 10 *Wend.*, 608).

The question then arises, whether the property alleged to have been fraudulently disposed of passed to the assignee in bankruptcy. If it did not, it is claimed that the complainant has a perfect right to proceed under any State laws which afford him the means of recovering the property and of compelling its application to the payment

of, this judgment. If the property did pass to the assignee, then it is quite clear that the present proceedings are in direct conflict with the bankrupt law, and cannot be maintained. I have stated that these proceedings cannot be sustained as a mere process for the punishment of the debtor, distinct from their legitimate end, which is the application of his property to the payment of the judgment. If, therefore, that property, or the right to recover it, be vested in the assignee in bankruptcy for the equal benefit of all the creditors, it needs no argument to prove that no one creditor can, through the agency of State laws, obtain a preference over other creditors, or the application of any part of the bankrupt's property for his exclusive benefit. Indeed, a Pennsylvania act, very similar to this of 1831, was lately held to be completely superseded by the bankrupt law; and, for the very reason that such a preference was in direct conflict with the law, and would, of itself, constitute an act of bankruptcy, proceedings under the State act were quashed (*Commonwealth v. O'Hara*, 6 *Am. Law Reg. N. S.*, 765; citing *Exp. Eames*, 2 *Story*, 322; *Sturges v. Crowninshield*, 4 *Wheat.*, 122; *Griswold v. Pratt*, 9 *Metc.*, 16). Now it is well settled by our court of last resort, that such a preference and exclusive application of the debtor's property are the results of a successful complaint, under the act of 1831 (*Spear v. Wardell*, 1 *N. Y.* [1 *Comst.*], 144; *Hall v. Kellogg*, 12 *N. Y.* [2 *Kern.*], 325). This brings us directly to the point at issue, and it seems to me that section 14 of the bankrupt law itself is decisive of it. That section explicitly provides that "all the property conveyed by the bankrupt in fraud of his creditors * * * shall, in virtue of the adjudication in bankruptcy, and the appointment of his assignee, be at once vested in such assignee." It is claimed that this provision can only have reference to fraudulent conveyances made after the passage of the act. But this proposition is based upon the argument, which I think fallacious, that the fraudulent conveyance is made illegal by the bankrupt act itself, and that thus by the opposite construction the law becomes *ex post facto*.

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The true construction of the provision, in my judgment, is that it places the assignee in the shoes of the creditors as well as of the bankrupt.

This provision was not contained in the bankrupt act of 1841, and it was held that, under that act, nothing passed to the assignee save those legal and equitable rights which the bankrupt could himself enforce (*Reaves v. Garner*, 12 *Ala.*, 661). That was one of the glaring defects of that act, and it was undoubtedly with the view of curing it that this provision was inserted in the present act. If, then, these conveyances, however old, were fraudulent as against the creditors of the bankrupt under any law, whether common or statute, whether under the laws of the United States or of this State, they are equally fraudulent as against the assignee in bankruptcy.

The conveyances are not made illegal by the bankrupt law ; but by its force, and by virtue of the proceedings taken under it, the assignee represents and has become a trustee for all the creditors of the bankrupt, as well as for the bankrupt himself, and is vested with every right which was possessed either by the bankrupt or the creditors in respect to fraudulent conveyances.

It follows, from these views, that the motion to quash the writ must be granted and the prisoner discharged.

STEWART *against* ISIDOR.

New York Common Pleas, Special Term ; March, 1868.

BANKRUPTCY.—LIEN OF CREDITOR'S SUIT.—SUPPLEMENTAL ANSWER.

It seems, that the lien acquired by the commencement of a creditor's suit to reach equitable interests and things in action, should not be regarded as

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attaching by the mere commencement of the suit, but only when judgment is obtained.

If it be otherwise, a creditor claiming such a lien under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien.

Where the defendants in such an action asked leave to serve a supplemental answer, setting up their discharge in bankruptcy, and it did not appear whether the plaintiffs had disclosed their claim of lien on proving their debt in bankruptcy,—*Held*, that leave to interpose the supplemental answer must be granted.

Motion for leave to put in supplemental answer.

This action was brought by Alexander T. Stewart against Siegfried Isidor and Julius Blumenthal, as debtors, and Moritz Isidor, their assignee.

The facts are fully stated in the opinion of the court.

Andrew Boardman, for the motion.

Henry Hilton and *H. H. Rice*, opposed.

BARRETT, J.—In the case of *Goodwin v. Sharkey*, decided on the 17th inst., I held that property which had been conveyed by a bankrupt in fraud of his creditors prior to the passage of the bankrupt law, became vested in the assignee in bankruptcy by the force of that act and by virtue of the proceedings thereunder (*Ante*, 64).

The question now arises as to the effect of these proceedings upon a judgment creditor's suit, commenced before the passage of the act, for the purpose of setting aside conveyances alleged to be fraudulent, and of reaching the property transferred thereby.

The facts are these: On the 20th of September, 1866, the plaintiffs recovered a judgment in the superior court of this city against the defendants, Siegfried Isidor and Julius Blumenthal, for the sum of \$730.42. Shortly prior thereto these defendants made an assignment of their property to the defendant, Moritz Isidor. Execution having been issued upon that judgment and returned unsatis-

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fied, this suit was commenced on the 30th of October, 1866. The complaint charges fraud in the making of the assignment, and seeks to set it aside and obtain the application of the property so conveyed to the payment of the judgment. Issue was joined, and the cause has since remained untried upon the equity calendar of this court. On the 10th day of February, 1868, the judgment debtors, Siegfried Isidor and Blumenthal, obtained their discharge in bankruptcy from the district court of the United States for the southern district of New York; and it appears that in the proceedings which resulted in that discharge the plaintiffs appeared, proved their claim, and opposed the discharge. It does not appear whether the plaintiffs, in proving their debt, referred to the present suit or to the lien which they claim to have acquired thereby.

A motion is now made for leave to file a supplemental answer, setting up these facts; and it is resisted solely upon the ground that the discharges in bankruptcy are no bar to the present action. The discussion having been solely upon the merits of the proposed defense, it is proper that the effect of the discharges should now be considered.

The weight of authority in this State would seem, upon a casual examination, to favor the position that the mere commencement of an action in the nature of a creditor's bill gives to the creditor an equitable lien upon the property and things in action of the debtor, whether in his hands or in the hands of a fraudulent transferee (*Storm v. Waddell*, 2 *Sandf. Ch.*, 494, where the numerous cases are cited and fully discussed; *Insurance Company v. Power*, 3 *Paige*, 365; *Roberts v. Albany & W. S. R. R. Co.*, 25 *Barb.*, 662; *Macy v. Jordan*, 2 *Den.*, 570; *Field v. Sands*, 8 *Bosw.*, 685). The rule would, in my judgment, be more satisfactory if confined to cases where the disposition of the property sought to be reached had been restrained by injunction, or where the property itself had been placed in the hands of a receiver pending the suit. Indeed, it was suggested in *Storm v. Waddell*, above cited, that "in regard to chattels subject to execution the lien

may depend upon the receivership," but in respect to equitable interests and things in action, it was distinctly held that the lien was acquired by the mere commencement of the suit. The rule is not elsewhere so broadly stated ; and I think that its application to strict creditor's bills, where, upon filing the bill, an injunction was taken out and served with the subpœna to answer, is all that is fairly deducible from a careful examination of the other cases cited. Where the action is simply to set aside an alleged fraudulent transfer, the lien, in the absence of any restraint by injunction upon the fraudulent transferee, must be purely theoretical. As a fact, it is dependent upon success in the action.

Considering, then, that a lien charges the specific property, and follows it into the hands of whomsoever it may come, it is apparent that the effect of extending the rule to the mere commencement of such an action, without any accompanying act, either placing the property in the custody of the law, or staying its disposition, would be disastrous to the rights of innocent third persons. It would be more reasonable in such cases to limit the creditor to an equitable right to priority in case of success, when, with the judgment setting aside the transfer, the lien would naturally and properly attach. Then the remedy in case of a disposition of the property prior to the acquisition of the lien,—that is, prior to the decree,—would be against the wrongful disposer, and not against the property itself, and thus third parties as well as the creditor would be protected. This question as to the existence of a lien becomes important in view of the provisions of the bankrupt law preserving intact all liens existing in good faith upon the property of the bankrupt. It was held, under the bankrupt act of 1841, that where a lien had been acquired by the proceedings in a creditors' suit, that lien was not impaired by the discharge and personal exoneration of the bankrupt, but that the suit might proceed *in rem* against the property and things in action which were the subject of the lien (*Lowry v. Morrison*, 11 *Paige*, 327 ; *Matter of Allen*, 5 *Law Rep.*, 362, and

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cases above cited). But the plaintiff's difficulty here is two-fold. Not only is the existence of a lien, within the meaning of the bankrupt law, exceedingly doubtful, but there is also a grave question as to whether the lien, assuming it to have existed, was not waived by the proving of the debt in the court of bankruptcy. In *Haxton v. Corse*, 2 *Barb. Ch.*, 531-2, the chancellor (affirming the vice-chancellor, in 4 *Edw. Ch.*, 585) held that the complainants, by going into the bankrupt court subsequent to the filing of their creditors' bill, and there proving their debt and opposing the bankrupt's discharge, had abandoned the lien acquired by their proceedings in chancery; that the retention of the lien under such circumstances was utterly inconsistent with the intent and meaning of the bankrupt act, and that by the mere proving of the debt the creditors' bill was absolutely relinquished, surrendered and discontinued. This was a construction of provisions very similar to those contained in the present bankrupt law. The rule is the same in England; and under the bankrupt act of that country, where parties have proved their debts upon the footing of holding no security, they have been repeatedly ordered to deliver up to the assignee in bankruptcy the property on which they had a lien (4 *Younge & Collyer*, 119; *Exp. Solomon*, 1 *Glyn & Jam.*, 25; *Exp. Spottiswood*, 1 *Fonb.*, 20; *Exp. Hornby*, *Buck B. C.*, 351; *Exp. Downes*, 1 *Rose*, 96; *Exp. Eggington*, *Montagu*, 72). Our present bankrupt law, section 20, permits the creditor to prove his debt for the balance which may remain after deducting the value of the property held by him as security, to be ascertained by agreement between him and the assignee, or by a sale under the direction of the court; but it is quite clear that, if the creditor prove his full claim without reference to his lien or security, and without apprising the bankrupt court of its existence, such an act would be a waiver of the lien, and a relinquishment of the security to the assignee. Otherwise, the creditor, besides realizing on the collateral, might receive a dividend upon his entire debt, and thus reduce the dividend to which the other creditors would be

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entitled in case his debt had been placed upon a proper footing. If the plaintiffs in the present case proved their full debt without disclosing or referring to the lien which is claimed to have resulted from the commencement of this suit, then, under section 21, that lien is gone, and this suit is relinquished, discontinued and discharged; and even if these proceedings were disclosed, the question is still so serious that the right to interpose the supplemental answer is unquestionable.

The motion must be granted, with leave to plaintiffs to discontinue without costs.

affirmed
3 days, 70.
40 + 6.555. Contra
14000 n.s. 183-186.
disapproved 12 add. n.s. 308, 310.

**HODGKIN *against* ATLANTIC AND PACIFIC
RAILROAD COMPANY.**

New York Common Pleas, Special Term; October, 1868.

A party to an action cannot be compelled by the adverse party to make an affidavit for the purpose of a motion, under subdivision 7 of section 401 of the Code of Procedure, as amended in 1862.

The case of *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb. Pr. N. S.*, 430,—disapproved on this point.

Motion to set aside an order.

Joseph H. Choate, for the motion.

Charles Wehle, opposed.

BARRETT, J.—The question presented is whether subdivision 7 of section 401 of the Code, enacted in 1862, is broad enough to cover the case of a party to an action, whose affidavit, for the purposes of a motion, is required by his adversary. Section 389 specifically provides that no examination of a party, at the instance of the adverse party, shall be had, except in the manner prescribed in chapter 6 of title 12. That chapter only permits such an examination before or at the trial, or conditionally or up-

on commission, and clearly for the sole purpose of obtaining testimony to be used upon the actual trial of the action. Here is an express prohibition of any other manner of examination, and, as a consequence, of any examination for a different purpose. An intention to abrogate or interfere with this prohibition is not to be presumed, unless it is manifestly inconsistent with and repugnant to the amendment. In my judgment, there is no such repugnancy between the provisions in question; and full effect can be given to the amendment, fairly construed, without disturbing the prohibition. It is true that the amendment provides for the taking of the affidavit of "*any person*" who shall have refused to make "the same;" but this language, although ordinarily quite comprehensive enough to include a party to the action, as well as a mere witness, must, when read in the light of previous legislation, be considered as possessing but a special and limited signification, and as applicable only to those persons who may, by existing laws, be subjected to this species of examination. It is to be considered that a party has never been required to make an affidavit, or to testify upon a motion, or other collateral proceeding in the action, in behalf of his adversary. It was not until the passage of chapter 462 of the Laws of 1847 that his testimony, even upon the trial, could be compelled; and the only remedy had been by bill of discovery. The provisions of the revised statutes, conferring upon the supreme court power to take, by commission, a deposition required for the purposes of a motion (2 *Rev. Stat.*, 554, §§ 24, 25), as well as those of chapter 276 of the Laws of 1840, furnishing a simpler and speedier means of obtaining the same end in the superior court of the city of New York, and in this court, cover the case of an ordinary witness only. The language used in both acts is "*any witness* who shall have refused voluntarily to make his deposition." It has not only been repeatedly held that neither these provisions nor the act of 1847 authorizes the examination of parties upon a motion, but the courts have gone further, and have declared that, had they been

sufficient to effect such a purpose, then they must be deemed to have been repealed, *quoad hoc*, by section 389 of the Code (Palmer v. Adams, 22 How. Pr., 375; Huelin v. Ridner, 6 Abb. Pr., 19; Keeler v. Dusenbury, 1 Duer, 660.)

Thus it will be perceived that while the legislature, in the case of ordinary witnesses, has favored the fullest disclosure of facts, whether directed to the issues or purely collateral, it has been slow to confer upon a party the right to require his adversary to furnish evidence against himself; and by its settled policy has confined that right to an examination upon the issuable facts in the action. The object of the prohibition contained in section 389 undoubtedly was to keep such examinations within proper bounds, and to prevent the abuses likely to arise, in case parties were afforded unlimited facilities for harassing each other by repeated examinations at every fresh step taken or motion made in the action. It is but reasonable to conclude that, had the intention been to depart from this policy, and to repeal or modify the prohibition, some express notice would have been taken of the latter, or the inconsistency would have been made apparent by the addition, after the expression "any person," of some such plain words as "or any party to the action." The real object of the amendment was, no doubt, to substitute an expeditious and simple process for the cumbersome and tedious commission so long in vogue in the supreme court, but not to extend its operation over a new and different class of witnesses. The "person" contemplated by the amendment is therefore, in my judgment, the "witness" referred to in the revised statutes, and in the act of 1840. Thus construed, no violence is done to the letter or spirit of the amendment, while its harmony with section 389, and with the evidently settled policy of legislation is fully preserved.

The question was not discussed by the learned judge in Fisk v. Chicago, Rock Island & Pacific R. R. Co. (4 Abb. Pr. N. S., 420), and it is evident that the point was but incidentally taken, and was treated as subordinate

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to the questions respecting the mode of procedure, and production of books and papers.

The motion must, therefore, be granted, but without costs, the question being novel.

SIPPILE *against* ALBITES.

New York Common Pleas, Special Term ; January, 1868.

INJUNCTION.—JURISDICTION OVER CONSULS.—ABSENT PARTIES.

In an action in a State court to stay proceedings on a judgment, and to have it set aside, upon the ground of fraud, if one of the defendants be a consul, the temporary injunction must be dissolved as against him, because State courts have no jurisdiction of the person of such an officer.

The injunction may, however, be continued, in a proper case, as against other defendants.

The fact that the character of a party is such as to deprive the court of jurisdiction of his person is, equally with his non-residence, sufficient excuse for proceeding without him, in a cause of equitable jurisdiction.

Motion to dissolve an injunction.

The defendants, Manara and De Negre, obtained a judgment in the supreme court in the first district against the defendants, Albites and Steffanone, for \$10,454.84. The plaintiff in this action, a special partner of Albites & Steffanone, sought by the action to set aside that judgment, upon the ground of fraud and collusion, and he obtained a temporary injunction to restrain the sale thereunder of the property of the firm.

Manara and De Negre now showed cause, and after reading certain affidavits upon the merits, the *exequatur* of Manara as consul of the Republic of Guatemala was produced, and it was claimed that the injunction should

be dissolved, upon the ground that the State courts had no jurisdiction. The remaining facts sufficiently appear in the opinion of the court.

Si ney S. Harris, for the plaintiff.

Joseph Gutman, Jr., for the defendant.

BARRETT, J.—It is perfectly well settled that the courts of this State have no jurisdiction in actions against the consuls of foreign governments (*Davis v. Packard*, 7 *Pet.*, 276; *Valarino v. Thompson*, 7 *N. Y.* [3 *Seld.*], 576.) It is equally well settled that the courts of the United States have not jurisdiction to enjoin the proceedings of a State court (*Diggs v. Wolcott*, 4 *Cranch*, 179).

Can it be possible, then, that, owing to the want of jurisdiction on our part over the person, and on the part of the United States courts over the subject-matter, the plaintiff is remediless?

It is clear that even the supreme necessity of the case cannot confer jurisdiction upon the State courts, in the face of the express prohibition contained in the judiciary act of 1789. The suggestion was made in *Valarino v. Thompson*, above cited, that where another person was liable jointly with a consul, the former, although not ordinarily subject to the jurisdiction of the United States courts, was thereby drawn into it necessarily and by unavoidable implication. Perhaps their jurisdiction may, by a like implication, and to prevent a denial of justice, be extended to a subject-matter over which the general rule is opposed to the exercise of their authority. Without speculating upon the possible action of a United States court, in such a contingency, it is apparent that this court cannot retain the injunction as against Manara.

With respect to the remaining defendants, the injunction should be continued until the hearing. There is certainly doubt as to the *bona fides* of the judgment. Manara says that his firm loaned \$15,000 to Albites & Steffanone "on and before" the 16th day of May, 1867, taking

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therefor three notes—one for \$4,000, payable August 1st, 1867; one for \$6,000, payable November 1st, 1867; and one for \$5,000, payable May 16th, 1870. Each of these notes carries interest from its date, and recites that value had been received “in money”—a peculiar and unusual expression to appear in such paper. Manara does not give the dates or amounts of these respective advances, nor does he tell us how much was loaned on the 16th day of May, and how much before. It is singular that the chattel mortgage, given to secure these alleged advances, should have been made to Manara personally, and not to his firm, and that the three notes should not have been specified in the condition, but that “the just and full sum of \$15,000” should be thereby made payable on the 1st day of May, 1870. This latter date seems to have no connection with any of the notes, for even the third is payable on the 16th of May, 1870. There is a suspicious silence, too, in respect to the averment of Manara & Co.’s limited means, and the consequent improbability of their being able to advance large sums; also, as to the fact that the advances are not entered in Albites & Co.’s books, and the complete poverty of that firm, notwithstanding such large advances.

It is not my intention to pass on the facts further than to show the existence of a reasonable suspicion, respecting the good faith of the judgment. That being found, there is no difficulty in upholding the injunction notwithstanding the dismissal of Manara from the suit. It is a familiar rule of equity that where a person who ought to be a party is out of the jurisdiction, and the fact is admitted or proved, that of itself constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him (*Story Eq. Pl.*, § 78; *Cockburn v. Thompson*, 16 *Ves.*, 326). This rule is not confined to mere nominal parties; and it is well settled that even in the case of one partner residing in a foreign country, the court will proceed to make a decree against the partners within the jurisdiction, provided it can be done without manifest injustice to the absent partner

(*Coop. Eq. Pl.*, 35; *Mitf. Eq. Pl.*, by Jeremy, 31, 164; *Couslad v. Cily*, *Prec. Ch.*, 83; *Darwent v. Walton*, 2 *Atk.*, 570; *Walley v. Whalley*, 1 *Vern.*, 487; *Milligan v. Milledge*, 3 *Cranch*, 220). Judge STORY says (*Eq. Pl.*, § 79), that these rules were peculiarly necessary in the courts of the United States, where suits can in general be maintained only by and against citizens of different States; and in *Simms v. Guthrie* (9 *Cranch*, 19), the supreme court of the United States held that on a bill filed in the circuit court to enjoin a judgment at law, it was not necessary to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.

There is no distinction in principle between the case of a party absent from the jurisdiction and one not subject to it. Equity in either case will grant relief as against those within and subject to its jurisdiction.

The doctrine contended for by the defendant would deprive the State courts of jurisdiction in every one of that immense class of cases which are the subject of equitable cognizance, where a single defendant happened to belong to this body of now exceedingly numerous public agents. Fortunately for the due administration of justice, equitable relief can in many instances be afforded without the presence of such parties; and in the present case, the complaint can be amended by striking Manara out as a party defendant, and inserting the proper averments to account for his absence. The suit can then proceed against the remaining defendants, Manara being amply protected by his partner, the defendant De Negre.

It was also suggested that Manara, upon the dissolution of the injunction as against him, might render the order futile by personally directing the sheriff to execute the enjoined process. The effect of the order is not the present question, and the subject need not be pursued further than to suggest that should the occasion demand, there can be no objection to making the sheriff a party defendant and enjoining him specifically.

The injunction must be dissolved as to Manara, and continued as to the other defendants.

STRINGHAM *against* THE SAINT NICHOLAS INSURANCE COMPANY.*Court of Appeals ; January Term, 1867.*

INSURANCE COMPANY. — AGENCY. — EVIDENCE OF AUTHORITY.

An agent of an insurance company, vested with authority to receive applications and make them temporarily binding, pending the consideration of the risk, and to receive premiums on renewals, has not implied authority to give consent to an assignment of a policy.

Authority to give such consent is not to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made, although the person applying for the consent to the assignment may have supposed that such agent had authority to grant such consent.

An agent cannot create an authority in himself to do a particular act, by its performance, or by asserting his authority to do it. To bind the principal, the agency must be established, and one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge must be proved.

Appeal from a judgment of nonsuit.

This action was brought by Joseph Stringham upon a policy of insurance issued to one Spaulding, under whom he claimed as assignee.

The facts are fully stated in the opinion of the chief justice.

W. Dorsheimer, for the appellant.

J. C. Dimmick, for the respondent ;—cited and commented on the following authorities: *Smith v. Saratoga County Mutual Fire Ins. Co.*, 1 *Hill*, 497 ; S. C., 3 *Id.*, 503 ; *Wilson v. Genesee Mutual Ins. Co.*, 14 *N. Y.* [4 *Kern.*], 418 ; *Lightbody v. North America Ins. Co.*, 23 *Wend.*, 22 ; *Amory v. Hamilton*, 17 *Mass.*, 109 ; *Perkins*

v. Washington Ins. Co., 4 *Cow.*, 645; Seymour v. Wyck-off, 10 *N. Y.* [6 *Seld.*], 224; Nixon v. Palmer, 8 *N. Y.* [4 *Seld.*], 398; Roach v. Coe, 1 *E. D. Smith*, 175.

DAVIES, Ch. J.—This is an action upon a policy of insurance, issued by the defendants to one L. Austin Spaulding, on July 12, 1856, in the sum of \$3,000, upon a stone flouring mill and machinery therein. On June 30, 1857, upon payment by Spaulding, the policy was renewed for one year from July 12, 1857, to July 12, 1858. On August 25, 1857, Spaulding assigned the policy and all his interest therein to U. H. Wolfe, and on October 5, 1857, Wolfe assigned the policy and all his interest therein to the plaintiff. The property covered by the policy was totally consumed by fire on November 15, 1857. The policy contained this clause: "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

Upon the back of said policy were printed two blank consents, as follows: "The St. Nicholas Insurance Company of the city of New York hereby consent that the interest of —— in the within policy be assigned to ——, subject nevertheless to the conditions therein contained. ——, Secretary."

The said consents were filled up and signed previous to the execution of said assignments, on August 25, and October 5, 1857, so as to read as follows: "The St. Nicholas Insurance Company of the city of New York hereby consent that the interest of L. A. Spaulding in the within policy be assigned to U. H. Wolfe, subject nevertheless to the conditions therein contained. H. A. BREWSTER, Agent."

The second consent was in all respects similar, except that the name of U. H. Wolfe appeared in place of L. A. Spaulding, and that of Joseph Stringham in place of U.

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H. Wolfe. The word "Secretary," in each of said consents, was erased, and the word "Agent" written in its place. The defense was, that as the company had never given its consent that the policy might be assigned to Wolfe, and by Wolfe to the plaintiff, and the same having been assigned without such consent, the policy had become void and of no effect. The referee who tried the action determined that the company had never given its consent to such assignments; that the consents given by Brewster, as agent, were unauthorized, and not binding on the company, and thereupon dismissed the complaint, and gave judgment for the defendants, which, on appeal, was affirmed at the general term. The plaintiff now appeals to this court. The only question seriously controverted upon the trial was, whether Brewster had authority to assent, on behalf of the company, to the assignments by Spaulding and Wolfe.

The plaintiff sought to establish such authority upon the grounds:

1. That Brewster had, on September 5, 1857, notified the defendants that Spaulding's interest in the policy had been assigned to Wolfe, and that the company had by silence ratified the same.

2. That Brewster, as agent of the defendants, had authority to grant the assent of the company to those assignments.

The first position was sought to be established by the testimony of Brewster.

[We omit here that part of the opinion which discusses the first of these two grounds, and which is occupied with the credibility of certain testimony, without bearing on the principles of law.]

It is now contended, however, that Brewster, as agent of the defendants, had authority to grant the assent of the company to these assignments. It is very apparent from the testimony and the correspondence between Brewster and the company what his powers were.

1. He had authority to receive applications for insurance, and make them binding upon the company for the

period of ten days. At the expiration of that time, if the company did not assume the risk, it terminated.

2. He had power to receive the premiums on renewals of policies, and transmit the same to the company, and if accepted by them, on the receipt by him of the renewed certificate, signed by the officers of the company, to deliver the same to the assured.

His duties seem to have been confined almost exclusively, if not entirely, to these two matters. I do not attach any importance to the statement made by Brewster, that his impression is that he executed other permissions to assign policies; he says, "It is an impression; I cannot state positively if such were executed, and I cannot say that they were"—for the reason already suggested, and for the additional one, that the statement is very vague and indefinite. If he had been in the practice of granting such consents, he could easily have ascertained the fact and mentioned the instances. The isolated case referred to in defendants' letter of February 13, 1856, wherein they state, "We have also noted the assignment of 8705, as requested," is too indefinite and uncertain to show that the agent had a general authority to give similar consents in other cases.

But the language of the policy, and the blank consent printed on the back thereof, unmistakably indicate the steps to be taken by a policy holder, when a consent to an assignment was desired, and the officer or agent only authorized to give the consent to assignments. As already observed, the policy carried on its face notice to all holders, that the interest of the assured was not assignable, unless by consent of the corporation manifested in writing, and the printed blanks on the back of the policy were like notice of the form of such consent, and the officer alone authorized to give it, and manifest the assent of the company. It was full notice to all that it must be done by its secretary, and the erasure by Brewster of the word "secretary," and writing in place thereof the word "agent," was an admonition to the parties that the authority to give the consent was in the secretary only.

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It is doubtless true that the person applying to Brewster for these consents may have supposed that he had authority to grant them, or if not, that his acts would be ratified by the defendants. But Brewster could not create an authority in himself to do the particular act, by its performance, or asserting his authority to do it. To bind his principal, his character as agent must be established and of so general a nature as to give him authority to do the act in question, or subsequent ratification, with full knowledge, must be established. The proof in this case falls far short of making out either of these propositions. It was sought to bring home to the defendants knowledge of these assignments, by showing that Brewster had entered in books kept by him at Rochester, the fact that he had given the consent to these assignments. To make the contents of these books knowledge to the defendants, it was proven that the defendants, on the application of Brewster, had paid one of them a small sum, and that said book was kept in the office of said Brewster, and was lettered on the back, "St. Nicholas Insurance Company, Policy Register, Rochester Agency, 1855."

The person who procured said consents testified, that on both occasions of procuring the same, "I saw said Policy Register, and that Brewster entered in said Policy Register, the fact of such permission and assignment, and its date," and that said person saw on these occasions each of said entries made. There was no evidence offered that the defendants, or any of their officers ever saw said book, or had any knowledge of its contents; and it affirmatively appeared that all the knowledge they or any of them had in relation to said book, was derived from a letter written by said Brewster to the secretary of the defendants, under date of "Rochester, August 6, 1855," in which he says: "We find it to be very necessary, as we advance in our business for you, that we should have a Policy Register for our own use. The companies we represent have generally preferred the purchase of a book here, and we charge it to them, though some prefer to send us books. Those we have cost us \$3.50, and are expressly got up for

us of a uniform kind. Can we order one for you?" To this letter the secretary of the defendants replied, under date of August 9, 1855: "Yours of the 6th instant is received. You are at liberty to purchase the necessary books on behalf of this company for the transaction of its business in your city."

The counsel for the plaintiff then turned to page 40 of said book, where the policy in suit is registered, and pointed out therein, against the description of the subject of insurance, the following entries in red ink:

"Assigned August 27, 1857, to U. H. Wolfe.

"October 8, 1857, to Joseph Stringham, Buffalo."

Defendants' counsel objected to the reading of either of said entries in evidence from said book, and the referee sustained the objection, and excluded the evidence, and the plaintiff's counsel then and there duly excepted to such decision. It certainly cannot be successfully maintained, that the circumstance that the defendants paid or consented to pay for the cost of this register for Brewster's own use, changed in any respect relations then existing between Brewster and the defendants. It is not suggested that the defendants, or any of their officers, ever saw the said register, or were at any time made acquainted with its contents, or the lettering upon it, or the particular purposes to which it was applied. It did not constitute Brewster the clerk of the defendants, or bind them by the entries he or his clerks made therein. Those entries were irrelevant to prove the fact that Brewster was the agent of the defendants to give their consents. That must be established by evidence *aliunde* his acts or declarations.

Neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another, or the extent of his powers (*Scott v. Crane*, 1 *Conn.*, 255; *Plumsted v. Rudebagh*, 1 *Yeates*, 502, 505; *James v. Stookey*, 1 *Wash. C. Ct.*, 330).

Brewster testified that his agency for the defendants commenced upon the receipt of the letter from the secre-

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tary of the defendants of April 13, 1855, and he produced the letter, and it was read in evidence. There was no proof that any other or greater powers were ever conferred upon him. It was in reply to a letter from Brewster, in which he says, "I should be glad to send your company risks, and can send you a good line at good rates." The defendants' secretary said: "Your views with regard to a local agent to attend to the interests of our company in your city are correct. Should you feel disposed to send us applications of character mentioned in your letter, we will be happy to respond to them. As our directors do not allow agents to issue policies, or make policies binding for terms of over ten days, as you can see by the enclosed receipts, we should restrict you also. . . . We have not had any printed applications of our own, but intend to get some printed soon. Should you send any applications, you can for the present use such as you have on hand, substituting our name, &c. If desired, we will forward you some of our certificates to bind risks temporarily."

The certificates so forwarded were in this form:

"St. Nicholas Insurance Company, No. 23, office corner of 8th Avenue and 14th St., New York. This certifies that I, H. A. Brewster, agent for the city of Rochester, have received of ——— dollars, being ——— months' premium on \$—— insurance as per application No. —, dated the ——— day of ———, 18—, to be forwarded to their office as above for their action. It being understood and agreed between the parties that the said St. Nicholas Insurance Co. are not liable for this certificate beyond ten days from the date of the application referred to, unless the risk is accepted and a policy made and delivered for the whole term of ——— months, and in case the risk is not accepted the premium is to be returned.

(Signed)

WM. WINSLOW, *President.*

WM. S. SLOCUM, *Secretary.*

"Dated this ——— day of ———, 185—.

Agent."

Brewster testified that he received these certificates as

early as when he commenced business for the defendants, as aforesaid, and exhibited them freely and generally to customers and persons who transacted business with the company at said office, No. 1 Arcade Buildings. Under plaintiff's objection, Slocum testified that some time in the early part of the year 1857, a conversation was had at the office of the company between the president of the company, the witness, and Brewster, respecting his power as agent. He wanted authority to write or issue policies for the defendants: he said he could do a large business, and a more desirable class of business, if he could issue policies. "I don't recollect the particular words, but we declined, as we had not given such authority to agents."

It is then apparent that the powers of Brewster as agent were restricted to the receipt and forwarding to defendants of applications for insurance, and authority to make a policy for only ten days; and the certificates which were exhibited to the customers generally, contained information of the character and extent of the powers of the agent. The declarations and acts of Brewster within the scope of his agency, if they had been admitted, would not be of any materiality. The declarations and representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency (*New York Life Ins. & Trust Co. v. Beebe*, 7 *N. Y.* [3 *Seld.*], 364; *Olding v. Smith*, 11 *Eng. L. & Eq.*, 424; *Very v. Levy*, 13 *How. U. S.*, 345).

In the case in 3 *Seld.* (*supra*), *Schermerhorn*, the agent, swore that he was the agent of the respondents in procuring a loan for them from the appellants, and it was contended, on the part of the appellants, that respondents were concluded by his acts and representations, the same as if they were their own, upon the principle which pervades all cases of agency—that the principal is bound by all acts of his agent within the scope of his agency, which he holds him out to the world to possess, and that where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting

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the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*. The court say: "The declarations or representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. But that was not the case here. Schermerhorn's agency was to obtain a loan for the respondents from the appellants. His alleged declarations, which are relied upon, were entirely without the scope of such or any other agency." In that case, there was no evidence to show that the respondents knew of the alleged representations of Schermerhorn, or that they ever authorized him to make them. So in the case at bar there is no evidence that these defendants ever authorized Brewster to give the consents to the two assignments mentioned, or that they ever knew that he had given such consents, until after the happening of the loss under the policy. We have seen what were the actual powers conferred by the defendants upon Brewster, and what was the scope of his agency.

Not only was the power to give the consents in question not within the scope of that agency, but the policy itself, and the blank consents indorsed thereon, gave notice to all holders of such policies that an agent of the company had no such power.

In view of all these considerations, the referee properly excluded the books kept by Brewster, and the entries therein. They were illegitimate to enlarge, alter, or modify his power as agent.

The judgment of the supreme court affirming the judgment upon the report of the referee was correct, and should be affirmed, with costs.

PARKER, J.—The question litigated in this action is, whether H. A. Brewster was the agent of the defendants, and as such authorized to give their consent to the assignments of the policy, through which the plaintiff claims it.

The referee nonsuited the plaintiff, on the ground that

he had failed to show that the defendants had consented, as required by the policy, to the assignment of it, or that Brewster had any authority to give such consent.

It is very clear, I think, that Brewster had, in fact, no such authority. But it is insisted by the plaintiff's counsel that the company dealt with Brewster in such a manner that he was justified in holding himself out to the public as its general agent; that he did represent himself to the plaintiff as such agent, and, therefore, that the company is bound by his acts in signing the consent to the assignments. It is not contended that the plaintiff was induced to accept the consent of Brewster as that of the company, by any act of the company implying or recognizing the authority of Brewster to give it, which came to the knowledge of the plaintiff, but that the acts of the company justified Brewster in assuming authority to give the consent, and therefore they are bound by it.

This is but stating, in another form, that Brewster was, in fact, the agent of the company, which proposition, as already intimated, I do not regard as sustained by the evidence.

Neither do I see anything in the evidence warranting the statement that the defendants had an office in Rochester, in charge of which Brewster was acting as clerk. The fact that he was authorized by the company, at his request, to purchase at their expense a policy register, in which to keep an account of the business which he should do for the company, comes far short of establishing the fact claimed for it.

I think the nonsuit was properly upheld by the general term, and its judgment should be affirmed.

All the judges concurred in affirming the judgment.

PEOPLE, *ex rel.* NOEL, *against* KINGSLAND.*Court of Appeals; January Term, 1867.*SUPPLEMENTARY PROCEEDINGS.—CONTEMPT IN DISOBEY-
ING INJUNCTION.

A debtor who, after the service of the usual order in supplementary proceedings, enjoining him from disposing of his property, draws out money previously deposited in bank under an account opened in his name "in trust," and applies a part of such moneys to his own use, or that of his family, is liable to be punished as for contempt therefor.

He cannot avoid such punishment by urging that he was doing business as agent for his wife, and that the funds were held by him in trust for her. The legal title, nevertheless, under such a deposit in his own name "in trust" was in himself.

Where the amount withdrawn was \$356,—*Held*, that a fine of \$400 was not unreasonable to indemnify the creditor.

Appeal from an order fining defendant for contempt.

This proceeding was instituted in the name of the People on the relation of Auguste Noel and others, against Richard Kingsland, a judgment debtor, against whom the relators had instituted proceedings supplementary to execution.

The proceedings supplementary to execution were taken under the provisions of the Code of Procedure on that subject, in order to compel the payment of a judgment of \$3,384.20, rendered July 7, 1865. At the time of serving the order, the relator caused to be served upon the defendant an order in the nature of an injunction order, by which he was forbidden to transfer or make any disposition of his property, or in any manner interfere therewith, until the further order of the court.

The defendant was examined on various days, commencing in October, and ending on the fourteenth of December, 1865. It appeared from his testimony that he had in the Manhattan Bank to his credit, at the time the order was served upon him, the sum of \$546.15, and that during the month of October he drew out upon his check all of this money except a balance of \$31.65. The bank account was headed "Manhattan Bank in account with Richard Kingsland, in trust." It further appeared that the moneys so drawn were drawn upon checks signed by the defendant, individually, and expressed to be for "family," for "board," for "office," for "diff. on stock," "Ed. Baldwin." Upon an order to show cause, the court below adjudged him guilty of a contempt in using this money, and imposed upon him a fine of \$1000.

Upon an appeal to the general term the sum was reduced to \$400, and the order was affirmed to that extent.

E. More, for the appellant.—I. Mrs. K. claims this money. Defendant concedes it is hers. As between them, her title was perfect. Both dying intestate, it would go to her heirs, not his. The injunction forbids a disposition of his property, not of property which, not being his, may or may not be declared to be hers, as to creditors in a suit where all parties are impleaded, according to the varying views of the court or jury. "The judge may forbid a transfer, &c., of the property of the judgment debtor" (*Code of Pro.*, § 298). "The judge may order any property of the judgment debtor to be applied towards the satisfaction of the judgment" (*Id.*, § 299). We supposed the law to be settled, that in this proceeding, where the third party claiming is not a party, and the property is really claimed by such third party, and the claim acknowledged by the defendant, the court cannot try the question (*Rodman v. Henry*, 17 *N. Y.*, 482; 12 *How. Pr.*, 209; 10 *Abb. Pr.*, 103; 23 *How. Pr.*, 423; 26 *Id.*, 155; 15 *Barb.*, 300; 1 *Hill.*, 105; 2 *Id.*, 95; *Teller v. Randall*, 40 *Parb.*, 242).

II. That these marriage gifts were hers at common law

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is beyond dispute. They belong to the class of gifts which from their nature are intended for her separate use (*Fonbl. Eq.*, 101, note o ; *Graham v. Londonderry*, 3 *Atk.*, 193).

III. The court below assumes that the agency was a pretense. Is it so bald a case that they can dispose of it safely without hearing the claimant, disregard the advice of counsel, and even punish the defendant, and his counsel through him, for misapprehending his rights? The cash in bank was \$546.15, of which \$157.50 belonged to Baldwin. Defendant at special term was fined \$1000. We were permitted to have a stay of commitment to enable us to bring this appeal, on paying costs, and stipulating to submit the case at first term. If this were a creditor's bill against Kingsland and wife, her title to this money would be unquestionable on the evidence in this case. To provide such a mode of supporting families in adversity was one of the humane objects the legislature had in view in 1860, and especially in 1862. This court has not been slow in carrying out its spirit (*Buckley v. Wells*, 33 *N. Y.*, 518 ; *Knapp v. Smith*, 27 *Id.*, 277). Again, in equity, she was a creditor of his to \$12,000 and over. She could hold funds deposited to her credit for her on this ground (*Schaffer v. Reuter*, 37 *Barb.*, 44).

IV. As a general rule, it will not do to violate an injunction under advice of counsel. It must, however, be clear and explicit (*Laurie v. Laurie*, 9 *Paige*, 233 ; *Moat v. Holbein*, 2 *Edw. Ch.*, 188). Why? To the end that defendant may not violate it through misapprehension. The question in this case is one about which lawyers and even courts have differed, as in *Buckley v. Wells*. Plaintiff could have filed his bill against K. and wife, and had an injunction explicit and clear. Defendant and his counsel did not understand that this injunction reached the property of a third party, which was liable to be declared his at the instance of an assailing creditor. Within the spirit of these cases, defendant is entitled to protection in any event.

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V. If it shall be urged that the fact that he had his own name up, and a license in his own name operated to estop the wife, we answer: (1.) A broker's office is on the street. The sign, in that case, only indicates the place where the person is to be found, or receives letters. It is unlike a mercantile business. (2.) There is no proof that Mrs. K. assented to it. (3.) The license had to be in his name. (4.) In any event, plaintiffs must show that they trusted to such appearances. The evidence does not show, unless indifferently, when plaintiffs' debt was contracted. The fact is, it was one of his old debts, though not put in judgment until 1865. If plaintiffs would estop her, they must show their debt was contracted while this state of things existed. The fact that K. was doing all his business for and on account of his wife, renders it improbable, if not impossible, that this debt was contracted after the summer of 1864, and the examination of defendant renders it clear that it was not. The order or judgment should be reversed, with costs to be paid by the plaintiffs, and not be set off against their judgment.

J. T. Glover, for the respondent.

HUNT, J. (after stating the facts).—In support of the appeal it is urged that the defendant was doing business as an agent for his wife, that the money deposited in bank belonged to her, and that since the recent statutes she was authorized thus to transact business, and authorized to employ her husband as her agent for that purpose.

These questions do not arise. If the business had been transacted in the name of Mrs. Kingsland, and the money had been deposited to her credit, a different question would have been presented. The legal title to the money in bank would have been in her. As the case stands, the legal title to the money, and to all of it, was in the defendant; and the claim of the wife and of Baldwin, so far as they had claims, gave them no legal title to the specific money in bank. If the defendant was in truth acting as the agent for his wife, and all the money under

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his control, either in bank or upon his person, was the result of the business transacted for her, I do not say that she had not an equitable claim to the money. If the "\$157.50 paid E. A. Baldwin," was a balance due to Mr. Baldwin upon sales of stock for his account, it is quite certain that he ought to have been paid that amount. But whether, in either of these cases, the creditors would have had an equitable lien upon the specific fund, or whether they were simply creditors at large of Kingsland, it is not now necessary to consider. It is sufficient for the present purpose that the legal title to the money was in the defendant, and that no proceedings had been taken to enforce the equitable claim of any other party. In using and disposing of the money, he violated the injunction order served upon him.

It appears also, from the testimony of the defendant, that his funds in bank were in part the produce of his business as a broker; that he received money for others, and also his commissions; that he did his business as a broker in his own name; that his commission as a broker sometimes amounted to \$500 per month, and these funds, as well as the amount of sales of stock, constituted his deposits in bank. Whatever might be the claim of his wife, upon a settlement of his accounts with her as her agent, it is plain that the money thus earned by the services of the defendant, and deposited to his own credit in the bank, was the money of the defendant. When he used this money, as stated in the case, he violated the injunction order forbidding him to interfere in any manner with the funds or property belonging to him.

The order should be affirmed, with costs.

PARKER, J.—The evidence before the justice of the supreme court who made the order adjudging the defendant guilty of contempt in disobeying the injunction order obtained against him, was sufficient to warrant the decision made.

He paid out, after the service of the order upon him, of

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moneys on hand at the time of such service, over \$800. This was money deposited to his credit in the bank, and though the account was kept by the bank with "Richard Kingsland, in trust," yet all his deposits were credited to that account. He was doing business as a stock-broker in his own name, and on his own account. If he sold stock for other persons, whether his wife or others, he deposited the proceeds to that account. He also deposited his own earnings, or portions of them, to the same account.

Now, of the \$800 expended by him, \$356.25 was individually expended for himself and family. The presumption most favorable to the defendant, taking his own theory that the moneys received by him for sales of stocks for his wife and others he held in trust, is, that these expenditures were from his own portion of the moneys on deposit.

The general term, taking the most favorable view for the defendant, reduced the fine from \$1000 to \$400. This latter sum was surely not an unreasonable amount to indemnify the relators for the withdrawing of the \$356.25 from being applied to their judgment, and to satisfy their costs and expenses of the proceeding.

The order appealed from should be affirmed, with costs.

All the judges concurred in affirming the order.

MATTER OF GRIFFIN.

Supreme Court, First District; General Term, Nov., 1868.

APPOINTMENT OF COMMITTEE.—APPEALABLE ORDER.

An order removing the committee of a lunatic, and appointing another person in his stead, is a matter in the discretion of the court, and an appeal does not lie therefrom to the general term.

Appeal from an order.

In the month of September, 1865, Griffin was declared a lunatic. His wife and one George E. Ranous were appointed committee of his person, and Ranous was also appointed committee of the property and estate of the lunatic.

In July, 1868, Mrs. Griffin applied by petition to have Ranous removed, making various charges against him. The matter was heard on affidavits before Mr. Justice CARDOZO, who removed Ranous, and substituted James M. Sweeney, Esq., in his place.

Ranous appealed to the general term.

A. Prentice, for appellant.

R. D. Hatch, for respondent.

BY THE COURT.*—The court may always change its officer, whenever it thinks proper to do so. It is a matter resting wholly in discretion, and cannot be reviewed. The order below is not appealable, and the appeal must be dismissed with costs.

Ordered accordingly.

* Present, BARNARD, P. J., and INGRAHAM and CARDOZO, JJ.

PARKER *against* McCLUER.*Court of Appeals, January Term, 1867.*

ADVANCEMENT DURING LIFETIME OF TESTATOR.—STATUTES, WHEN TO TAKE EFFECT.

An advancement may be established by parol.

A verbal agreement between father and son, that the son should have a certain piece of land in full for his share as heir of the estate of the father, (the land being, at the time of the agreement, of proportionate value to constitute such share), without any writings being made between them, and no written evidence of title given by the father to the son is, if followed by possession and enjoyment by the son, an advancement, within the provisions of the Revised Statutes applicable to advancements to children by their parents (1 Rev. Stat., 754); and if it does not appear that the decedent left any personal or real estate other than what he possessed at that time, so that the advancement appears to be equal, if not superior to the amount of the share which the child would have been entitled to have received from the estate as heir, such child and his heirs will be excluded from any further share in the estate of the decedent.

Equity would interpose against the claim of the heir in such case.

The provisions of the statute relative to advancements applies to transactions in the nature of advancements made before the enactment of the statute, although the death of the father occurred after the enactment of the statute.

Appeal from a judgment.

This action was brought by Eunice Parker, one of the heirs of Joseph McCluer, against Porter McCluer, a grandson of said Joseph, to recover the possession of land left by the said Joseph. Both parties claimed as heirs at law of the decedent. The defendant resisted the plaintiff's claim, on the ground that during the lifetime of the decedent, the decedent made an advancement to Samuel McCluer, the father of the plaintiff, of a share of his real

estate, in full of his right of succession to the estate of the decedent; and the defendant alleged that he, the defendant, had acquired the title in the premises in question of all the heirs other than plaintiff.

The facts found by the court upon a trial of the cause are fully stated in the opinion of the chief justice.

The supreme court held that the plaintiff was not entitled to recover, and gave judgment for the defendant; from which the plaintiff now appealed.

That part of the opinion of the supreme court (delivered by MARVIN, J.), which relates to the question of the applicability of the statute, notwithstanding the fact that the transaction occurred before the enactment of the statute, is as follows:

“It is said by the plaintiff’s counsel that there was no statute prior to January, 1830, relating to the advancement of real estate, and excluding the heir advanced from a portion of his inheritance:

“That by the revised laws (1 *R. L.*, 313, § 16) an advancement of real estate only operated to exclude the child so advanced from a full share in the distribution of the personal estate.

“In the present case, whatever occurred between Samuel and his father in relation to the 45 acres, was prior to 1830, when the provisions in the revised statutes took effect.

“These provisions are more ample than those in the revised laws.

“If the advancement in real estate has been sufficient, it will exclude the child advanced from any share in the real estate; and if not sufficient, then he can only inherit enough to make him equal with the other children (1 *Rev. Stat.*, 754, §§ 23, 24).

“It is claimed that the provisions of the revised statutes can have no effect in this case, as the arrangement between Samuel and his father, Joseph, was in 1828, and Samuel died in 1829, prior to the revised statutes of 1830.

“The provisions of the statute referred to, are in the

chapter relating to real property by descent ; and it is declared that ‘ If any child of an intestate shall have been advanced by him, a settlement or portion of real estate or personal estate, &c., &c., the value thereof is to be reckoned, &c.,’ and, in short, set off.

“ In the present case, Joseph McCluer, the father, did not die until Sept., 1833, long after the revised statutes were in force ; and they applied to the real estate of which he died seized and directed how it should descend.

“ The direction is, if any child has been advanced, then such child shall not take a full share of the real estate by descent of which the parent died seized.

“ The statutes had full effect upon the descendible estate of Joseph McCluer, and although the advancement may have been made prior to the revised statutes, it was certainly competent for the legislature to enact a law which should control the descent of the real estate of persons dying intestate thereafter, which should exclude a child who had been advanced at any time.

“ If, therefore, this was a clear case of advancement by the father Joseph to the son Samuel, made in 1828, I should not hesitate to apply the statute, and exclude the children of Samuel from any share of the real estate of their grandfather.

“ But the case does not show that any advancement was made by deed of conveyance or other written instrument.

“ It does not show in whom the title to the 45 acres in fact was.

“ It shows that Samuel, the son, executed to Joseph, his father, a quit-claim deed of certain land, excepting and reserving the 45 acres ; that the father was at that time in possession of the 45 acres ; that the father agreed verbally that the son should have the 45 acres in full for his share as heir of the estate of Joseph, his father ; that immediately after the arrangement, the 45 acres were surveyed off to Samuel, and he went into possession, and so remained about one year, until his death, and some two years after his death, the land was sold by his ad-

ministrators for the purpose of raising money to pay his debts.

“Joseph never claimed the land after the arrangement of July, 1828, nor have his heirs claimed it since his death.

“The plaintiff became of lawful age in Aug., 1849. Is not this a case for the application of principles of equity, which will prevent a recovery by the plaintiff? It so seems to me. If we should assume that the title of the 45 acres was in the father, Joseph, the agreement to advance it to his son Samuel, in full for any anticipated share of his father's estate, and the agreement of Samuel so to accept it, together with the part performance, by putting Samuel into possession, and leaving him and his family in full possession, until the property is in a lawful way appropriated to the payment of Samuel's debts after his decease, make, as I think, a case in equity, equivalent to an actual advancement by a conveyance of the land. If the title was in fact in Samuel, and the land in equity belonged to Joseph, no conveyance would be necessary to vest the legal title to Samuel, and if he agreed to accept and hold the land absolutely as his, in full for any share he might, upon the decease of his father, be entitled to, in lands of which his father should die seized, and it should appear upon the death of his father, that such land was of the full value of any share as heir, that he would be entitled to, assuming his father to have died seized of this land, as well as that of which he was in fact seized, it would be no more than equitable that he should be excluded from any share in the lands of which his father was in fact seized at the time of his death.”

A. S. Rice, for the appellant.—I. The plaintiff, as heir at law of Joseph McCluer, deceased, asks to recover the one undivided sixty-fourth part of the premises described in the complaint, which are conceded to be parcel of the land of which Joseph McCluer died seized. The proofs established a *prima facie* right in her to recover the same. (1.) Joseph McCluer was seized of the land at

his death, and died intestate. (2.) The plaintiff was heir to Samuel McCluer, who, had he lived, would have been heir to Joseph McCluer, and by reason of his death before the death of Joseph, the plaintiff was an heir to the one sixty-fourth of Joseph McCluer's estate. (3.) The plaintiff was an infant when the descent was cast, and her right of entry was not barred till the expiration of ten years after she became of full age, which was on the 18th day of August, 1859, and the action was commenced on the 3rd day of August, 1859 (2 *Rev. Stat.*, 293, §§ 5, 295, 16). (4.) The defendant was in possession claiming the entire title, to her exclusion.

II. The plaintiff, having thus established a right to recover *prima facie*, the burden is cast upon the defendant to establish facts which necessarily destroy the *prima facie* right of the plaintiff; and if he fails to establish *all* those facts, and to establish them so fully and so perfectly as to enable the court to apply them to the extinguishment of the right of recovery already established by the plaintiff, the plaintiff must have judgment.

III. The verbal agreement, made in 1828, between Samuel and his father, was not effectual as an advancement, which, under the revised statutes, would exclude Samuel or his heirs from a participation in the estate of Joseph McCluer. (1.) Advancements are creatures of the statute, and have no effect other than such as is given them by the statute (*Thomson v. Carmichael*, 3 *Sandf. Ch.*, 120). At the time this verbal agreement was made, the statute (1 *Rev. Stat.*, 313, § 16) excluded the child advanced from a participation in the distribution of the personal estate only, and it was not until January 1, 1830, and after the death of Samuel McCluer, that the provisions of the revised statutes (1 *Rev. Stat.*, 754, §§ 23, 24, 25), which are relied on in this case by the defendant, went into effect. (2.) When Joseph McCluer died, the revised statutes were in force, and controlled the descent of his real estate. But the provisions of the revised statutes are not necessarily retrospective in their operation, and it is submitted that they do not give to an advancement made in 1828,

an effect different from that given to it by the statute then in force. The general rule is, that no statute is to have a retrospect beyond the time of its commencement (6 *Bac. Abr.*, 370, *Stat. C.*; 1 *Blacks. Com.*, 44; *Smith Com. Stat. and Const. Con.*, 679; *Sedgw. on Stat. and Con. Law*, 188, *et seq.*; *Id.*, 404, *et seq.*; *Dash v. Van Vleet*, 7 *Johns.*, 477; *Co. Litt.*, 360, *a*; *Murray v. Gibson*, 15 *How. U. S.*, 421; *Plumb v Sawyer*, 21 *Conn.*, 351; *Wood v. Oakley*, 11 *Paige*, 400; *Bailey v. The Mayor*, 7 *Hill*, 146; *Jarvis v. Jarvis*, 3 *Edw. Ch.*, 462; *Butler v. Palmer*, 1 *Hill*, 324).

(3.) An advancement, to be effectual to exclude an heir, must be evidenced by grant, deed or other writing, expressing its purpose, or made under circumstances from which the purpose can legally be implied. It cannot be established by parol. There are no adjudications in this State on this point. (4.) Admitting that the transactions between Samuel and Joseph amounted in law or equity, to in advancement of the 45 acres to Samuel, and that the revised statutes cover such a case, still the defendant fell short of making out a defense, and failed to establish sufficient facts to enable the court to apply them to the extinguishment of the plaintiff's *prima facie* case. The facts found say, that 45 acres were worth, at the time of the giving of the quit-claim deed, and the making of the verbal agreement, in July, 1828, more than one-eighth of all the *land* owned by Joseph McCluer at that time. Applying to this statement the ordinary rules for the construction of evidence, and it means just one-eighth, and no more, for the excess is too uncertain to be calculated or made available. To have established an entire defense, the defendant should have shown that the value of the 45 acres was equal to the one-eighth part of the *real* and *personal* estate of Joseph McCluer (1 *Rev. Stat.*, 754, § 23); or if it fell short in value of the one-eighth part of all the *real* and *personal* estate of said Joseph, then the defendant should have shown its relative value, in order to have made it available as a partial defense (*Id.*, § 24). Again, it is said in the finding of the facts, that the value of the 45 acres was more than (equal to) one-eighth

of all the *land of Joseph McCluer at the time of the agreement, July, 1828*. To have made an entire defense, the defendant should have shown that the value of the forty-five acres *at the time of the agreement in 1828* (1 *Rev. Stat.*, 754, § 25), was equal to one-eighth part of all the *real and personal estate of Joseph McCluer at the time of his death in 1833* (*Id.*, § 23). Or, if less, its relative value should have been shown to make it available as a partial defense (*Id.*, § 24). Observe, Joseph McCluer may have had a large personal estate in 1828, and that personal estate may have been converted into land prior to his death in 1833, or the land which he had in 1828 may have increased largely in value prior to 1833, and from the finding that the value of the 45 acres in 1828 was equal to the one-eighth part of all the *land owned by Joseph McCluer at that time*, the court cannot judicially see that the value of the 45 acres, in 1828, which is the time at which *it* is to be estimated under the statute (1 *Rev. Stat.*, § 25), was equal to the one-eighth part of all the *real and personal estate of Joseph McCluer at that time*, or was equal to the one-eighth part of all the *real estate of Joseph McCluer at the time of his death*. It was not for the plaintiff to make any proof on this subject, but it devolved upon the defendant to establish facts bringing the case within the statutes and to make his facts sufficiently certain to enable the court to apply them as a total or partial defense. That he has failed to do. (5.) No advancement was consummated. Joseph never gave Samuel any title.

IV. The verbal agreement between Samuel and his father, in July, 1828, was inoperative, except as an agreement to release his right of inheritance and distribution, and as such an agreement, it was void by the statute of frauds. There never was any part performance by Samuel, the party sought to be charged. It was not insisted in the opinion of the supreme court, that the verbal agreement amounted to a *legal* advancement, or that it was operative as a release of Samuel's inchoate right as heir to his father's estate, or that as an agreement to release such right it was not void by the statute of frauds. In fact, all

these positions are conceded. The supreme court hold that, by applying certain equitable principles to the verbal agreement, and the acts of the parties under it, and to the inferences of fact which they say logically flow from the transaction, they can work out a case of equitable advancement, to which they apply the provisions of the statute and exclude the plaintiff; and we submit that, unless the facts establish a case of advancement in law or equity, falling within the provisions of the revised statutes, the defendant has no defense whatever.

S. S. Spring, for the defendant.—I. The facts of the case all concur in establishing presumptive evidence of ownership in Joseph at the time the agreement was made.

II. The revised statutes of this State (1 *Rev. Stat.*, 754, §§ 23, 24, 25), authorize a parent to make an advancement to his child of real or personal property either in full or partial satisfaction of his share as heir at law, &c. (1.) But it is claimed that there was no statute in this State authorizing an advancement of real estate at the time that the agreement in question was made. Joseph McCluer died in 1833, and since the enactment of the statute in question. That statute provides for the descent of real estate in that class of cases where persons die intestate seized of real estate. And in so providing, such statute directs, that in case an heir at law of such intestate has received from such intestate an advancement, which is equal to the full amount of the share of the child so advanced, such child shall be excluded from any share real or personal of such intestate's property. Is it not the law of descent of real estate existing upon the decease of a person dying intestate, seized of real estate, which is operative and governs as to the descent of such real estate? If the law bars such descent to a child, upon the decease of the intestate, in consequence of such advancement having been made, wherein can it be material as to whether the law made any provisions as to advancement at the time said advancement was made? The matter of the des-

cent of real estate is purely a creature of the statute. And upon a change or amendment of the law relating thereto, no question can arise as to *vested rights*, or impairing the obligation of contracts.

II. It is claimed that the advancement was not valid, for the reason the land was not conveyed to Samuel. There was such a part performance of the agreement, by taking possession, &c., under the contract so as to take the agreement out of the statute of frauds in equity (*Malins v. Brown*, 4 *N. Y.* [4 *Comst.*], 403; *Lowry v. Tew*, 3 *Barb. Ch.*, 407; *Parkhurst v. Cortland*, 14 *Johns.*, 14; 2 *Story Eq. Jur.*, § 759; *Willard's Eq. Jur.*, 283-9). The case shows that Samuel McCluer and his heirs at law have had the full benefit of the 45 acres of land as a satisfaction of his share as heir at law, &c.

DAVIES, Ch. J.—This is an action of ejectment, in which the plaintiff claims to recover one sixty-fourth part of a certain farm, whereof Joseph McCluer died seized. He is one of eight children of Samuel McCluer, a son of Joseph McCluer.

The facts as found by the supreme court are as follows:

On the 19th day of July, 1828, Samuel McCluer, with his wife, executed and delivered to Joseph McCluer, his father, a quit-claim deed of the whole of lot No. 39, in Township No. 4, in the Holland Land Company's survey, in Cattaraugus county, which included the premises described in the complaint, excepting and reserving therefrom several small parcels theretofore conveyed, and also forty-five acres on the north-east part of the lot. At the time of giving such deed it was verbally agreed between Samuel and Joseph his father, that Samuel should have the forty-five acres on the north-east part of the lot, in full for his share as heir of the estate of the said Joseph; but no writings were made between them, and Joseph gave Samuel no written evidence of title to said forty-five acres. Joseph McCluer was in possession of the forty-five acres prior to that agreement, and immediately thereafter the

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said forty-five acres were surveyed off to said Samuel, and he went into possession of the same, and continued in possession thereof until his death in July, 1829.

At the time the deed was given, Joseph went into the possession of the land conveyed or quit-claimed by Samuel and his wife, and remained in possession until his death in 1833, and was seized in fee of the same at the time of his death. The premises described in the complaint form a part of the land conveyed to Joseph by Samuel, and form no part of the land excepted or reserved from said deed. Samuel died intestate in July, 1829, leaving him surviving eight children, of whom the plaintiff is one, all legitimate and heirs to his estate. Samuel was a legitimate son of Joseph; and had he been living when Joseph died would have taken as an heir to Joseph. Joseph died in September, 1833, intestate, and leaving him surviving seven children, heirs to his estate, and also eight grandchildren, the children of said Samuel, including the plaintiff. The defendant was in possession of the land described in the complaint at the time of the commencement of the action, August 3, 1859, and claimed title to the same, to the exclusion of the plaintiff. He had acquired all the title of all the heirs of Joseph McCluer, except the children of Samuel.

The plaintiff was born August 18, 1828, and claims judgment for the possession already mentioned as heir at law of Joseph McCluer, deceased. About two years after the death of Samuel, his administrators, pursuant to an order of the surrogate of Cattaraugus county, sold the forty-five acres for the payment of the debts of the said Samuel. It appeared that the forty-five acres, at the time the deed was given in 1828, were worth more than one-eighth part of all the land owned by Joseph at that time. The jury, under the direction of the court, rendered a verdict for the plaintiff for the undivided one-sixty-fourth part of the premises described in the complaint, subject to the opinion of the court at general term, which decided that the transaction between Joseph and Samuel amounted in

law to an advancement from Joseph to Samuel ; or if not, that the agreement, part performance, and attending circumstances were such as in equity to require that the agreement should not be disturbed by the children and heirs at law of Samuel ; or if not, that the legal title to the forty-five acres was in Samuel, and the equitable title in Joseph, and that the effect of the reservation and subsequent acts of the parties was a complete consummation of the agreement, and that the plaintiff could not recover any portion of the land described in the complaint as heir at law of Joseph McCluer or otherwise ; and gave judgment for the defendant.

The plaintiff now appeals to this court. The provisions of the revised statutes applicable to advancements to children by their parents are as follows :

“§ 23. If any child of an intestate shall have been advanced by him, by settlement or portion of real or personal estate, or of both of them, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate, descendible to his heirs, and to be distributed to his next of kin according to law ; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate.

“§ 24. But if such advancement be not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate and to inherit so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children in such real and personal estate and advancement to be equal, as near as can be ascertained.

“§ 25. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing, otherwise such value shall be estimated according to the

worth of the property when given" (1 *Rev. Stat.*, 1 ed., 754).

There was no acknowledgment in writing of the value of the real estate advanced to Samuel, and it was therefore proper to estimate the worth at the time the property was given. This time was the date of the deed or release from Samuel to his father in 1828, when forty-five acres were given to him, and a survey thereof made, and possession of the same given by Joseph to Samuel.

Samuel continued in possession thereof up to the time of his death, and it was subsequently sold for the payment of his debts.

Upon the facts found by the court, Joseph and his heirs would undoubtedly be estopped from setting up any claim to the forty-five acres; and if any such claim had been preferred, a court of equity would have restrained its enforcement.

It does not appear, from the finding of facts, that Joseph acquired any other real estate, prior to his death, than that which he owned at the time of the transaction with his son Samuel, on the 19th day of July, 1828. Neither does it appear that he died possessed of any personal estate. We are authorized to assume, to sustain this judgment, that he acquired no other real estate, after the 19th July, 1828, and that he did not die possessed of any personal estate. If the plaintiff's right of recovery was dependent upon establishing either of these facts, she should have done so upon the trial.

It having been found as a fact that the forty-five acres given by Joseph to his son Samuel in July, 1828, were worth more than one-eighth part of all the land or real estate of Joseph, we agree with the supreme court that the transaction between Joseph and Samuel amounted in law to an advancement from the former to the latter. Samuel, or his children, upon the death of Joseph, intestate, were entitled to take one-eighth part of his estate, real and personal. It not appearing that he left any personal estate or any real estate other than what he possessed on the

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19th of July, 1828, it appears from the facts found that Samuel was advanced more than one-eighth part of the estate which Joseph owned.

Such advancement being equal, if not superior to the amount of the share which Samuel would be entitled to receive of the estate of Joseph, it follows from the provisions of the revised statutes above quoted, that Samuel and his children, including this plaintiff, must be excluded from any further share in the estate of Joseph McCluer. This clearly should be so, until it is made to appear that he died possessed of any real or personal estate other than that owned by him on the 19th July, 1828.

This action is to recover one-sixty-fourth part of the real estate which this plaintiff's ancestor quit-claimed and released to the ancestor of the defendant, on consideration of receiving the forty-five acres, which were worth more than one-eighth part of all the real estate of the defendant's ancestor. If Joseph then had died intestate before such advancement or gift to Samuel, such one-eighth part would have been all that Samuel would have inherited. He has received his equal share and retained the same, and his heirs now claim the one-eighth part of the residue. A more inequitable claim could hardly be preferred, and I concur with the supreme court that it cannot be maintained.

Judgment should be affirmed with costs.

All concurred in affirming the judgment.

VIANY *against* FERRAN.*Supreme Court, First District; Special Term, May, 1868.*SPECIFIC PERFORMANCE OF COVENANT TO RENEW LEASE.
—APPOINTMENT OF ARBITRATOR.

Under a lease in which the lessor covenants to give a renewal if the lessee should serve a notice binding himself to take and accept it, the rate of rent upon such renewal to be fixed by arbitration,—the giving of such notice becomes immaterial after the parties have both proceeded to the appointment of arbitrators.

In such case, if the arbitration fails, by reason of the arbitrator chosen being unable to complete the reference, and the parties failing to agree on another umpire, the lessee may maintain an action of an equitable nature to compel the execution of a renewal lease, and have a reference to ascertain what the amount of rent should be.

Motion to dissolve an injunction.

This action was brought by Jean Viany against Auguste Ferran, to obtain specific performance of a covenant in a lease of real property, for a renewal, at a rent to be fixed by arbitration. It appeared that the parties had agreed upon Judge DALY as their arbitrator, or referee, under the covenant in the lease, but he having been unable to attend to the case, they had failed to agree upon any other. The plaintiff sought as relief in this action that the defendant be directed to proceed on his part with the arbitration and to appoint another, should the arbitrator appointed by the defendant refuse to act, and that the defendant be directed and required to execute a lease at the rent to be settled and determined on, as provided by the original lease and the covenants therein contained.

J. H. Pignolet, for the plaintiff.

H. Alker, for the defendant.—I. The plaintiff's prayer cannot be granted for the following reasons, viz: (1.) With regard to agreements to refer to arbitration, it is clear that the court will not entertain suits for their specific performance (*Price v. Williams*, referred to, 6 *Ves.*, 818; *Street v. Rigby*, *Id.*, 815; per Sir W. GRANT, in *Gourlay v. Somerset*, 19 *Id.*, 429; *Agar v. Macklen*, 2 *Sim. & S.*, 418; *Gervaise v. Edwards*, 2 *Dr. & W.*, 80; *South Wales Railway Co. v. Wythes*, 5 *De Gex*, 800). (2.) The court will not entertain a bill of specific performance of an agreement to refer to arbitration, nor substitute the master for the arbitrators (*Agar v. Macklin*, 2 *Sim. & S.*, 418).

II. As to the further prayer for judgment, viz: In case this court should determine the above relief prayed for is not the relief plaintiff is entitled to, that then the just annual rent of said premises for the said term be fixed under order and direction of this court, and that the defendant be compelled specifically to perform the covenants and conditions in said original lease in respect to the addition of five years. The plaintiff is not entitled to this relief. (1.) Because there is want of mutuality in the contract or covenant to renew lease. (2.) A party not bound by the agreement itself, has no right to call upon a court of equity to enforce specific performance against the other contracting party, by expressing his willingness, in his bill, to perform his part of the contract. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character (*Duvall v. Meyers*, 2 *Md. Ch. Dec.*; see, also, *Bodine v. Gladding*, 21 *Penn.* [9 *Harris*], 50. (3.) A contract will not be decreed specifically if there be no *mutuality*,—*i. e.*, if both parties cannot demand an execution, neither shall be favored (*Boucher v. Vanbuskirk*, 2 *A. K. Marsh*, 346). (4.) A conditional contract cannot be enforced unless the condition has been made absolute.

CARDOZO, J.—I think the learned counsel for the defendant misconstrues the provisions of the lease as to the renewal. The lease provides that if the lessee, having per-

formed his covenants, gives notice in writing on or before Feb. 1, 1868, *binding* himself to take and accept a further term of five years from May 1, 1868, the lessor will grant a new lease for such further period. It then provides for the fixing of the rent by arbitration, and instructs the arbitrators as to the "principle" by which they are to govern themselves, but it gives no option to the lessee to accept or reject the lease after the arbitrators have acted. It simply very inartificially prescribes a rule of action for the arbitrators. The lessee's obligation to take the new lease becomes perfect as soon as he gives the notice *binding* himself to take and accept another lease for the further term. The moment that notice is given the obligation of the plaintiff to grant, and of the defendant to take, the new lease becomes perfect and mutual. Whether the allegation in the complaint, that the plaintiff gave the notice that he would take the further term, be denied or not, is not material, because both parties are estopped on that point by having proceeded to appoint arbitrators. That appointment being an act only to be done after notice that the new lease was to be taken, neither party, after making the appointment, can be heard to assert that the notice had not been given. The case then is briefly thus: The parties have entered into a covenant for a renewal of the lease which, by the notice served by the plaintiff, became mutual and obligatory on both of them, and there is nothing to be done except to ascertain the rent, and that was to be fixed by arbitration. The arbitration was commenced, but fell through by reason of Judge DALY being unable to devote sufficient time to complete it, and the parties failing to agree upon any other umpire.

In *Kelso v. Kelly* (1 *Daly*, 419), Judge DALY, reviewing the authorities, says, "Where a valid contract has been entered into for the renewal of a lease, by which it is provided that the amount of rent to be paid shall be settled by arbitration, and the party who is to give the lease refuses to appoint an arbitrator, a court of equity will compel specific performance, and order a reference to ascertain

what the amount of the rent should be" (see also *Wells v. De Leyer*, 1 *Daly*, 45).

This I understand to be the settled law of this State, and I regard the principle as applicable to and decisive of the question in this case.

The motion to dissolve the injunction must therefore be denied. The costs may abide the event of the action.

LANERGAN *against* THE PEOPLE.

Court of Appeals, June Term, 1867.

INDICTMENT.—ELECTION OF COUNT.—EVIDENCE.—NEW TRIALS.—POWER OF GENERAL SESSIONS OF NEW YORK.

A felony can be charged in different ways in an indictment, for the purpose of meeting the evidence, as it may come out upon the trial; and, if this is done in good faith, it is not error for the court to refuse to compel the prosecution to elect upon which count they will claim a conviction.

A declaration made in the presence of one unconscious from sleep or stupor, is not evidence. To be admissible, it must not only be made in his bodily presence, but also within his hearing and understanding.

The court of general sessions of the city of New York has the power to grant new trials. The act of 1859 (Laws of 1859, ch. 339, § 4),—which grants to the "courts of sessions of the several counties" of the State the power to grant new trials,—is broad and comprehensive enough to include the court of general sessions of New York city.*

Writ of error.

The plaintiff in error was convicted of murder in the court of general sessions of the city of New York, at the June term, 1867, and sentenced to be executed. A writ of

* Overruling *People v. N. Y. General Sessions*, 15 *Abb. Pr.*, 59; and sustaining *People v. Powell*, 14 *Id.*, 91.

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error and stay of proceedings was obtained, and the case was removed into the supreme court for review : where the judgment was affirmed at the September term, 1867, from which affirmance the case was removed into the court of appeals.

The decision of the supreme court, now reversed by the court of appeals, is reported in 50 *Parb.*, 266 ; and also in 34 *How. Pr.*, 390.

William F. Kintzing, for plaintiff in error.

A. Oakey Hall (District-Attorney), for defendants in error.

DWIGHT, J.—The plaintiff in error was convicted in the general sessions of New York city, of the murder of his wife in that city, March 26, 1867. The conviction was of murder in the first degree. The indictment contained three counts, alleging severally, a killing with an axe, with a knife, and by beating and choking. After the evidence was in, the prisoner moved that the people be required to elect upon which of these counts they would go to the jury, which was refused by the court, and the prisoner excepted. A witness for the people, George Cram, said that on the day of the killing, at about one o'clock in the afternoon, he accompanied the prisoner home ; that the latter was very much intoxicated ; that as he entered the room where his wife was, he staggered against her and “went to strike her ;” that witness and the wife both remonstrated, and the prisoner staggered over into a rocking-chair and went to sleep ; that witness then advised the wife, who was not sober, to go into the adjoining room and lie down, and upon her doing so told her he must go to his work ; that the woman thereupon begged him not to go, and asked him, “Do you think he will kill me ?” to which witness replied, “No, what humbug ;” that at the time of this conversation the prisoner was in the adjoining room (the connecting door being open) in the chair asleep, “sound and solid ;” that he was asleep,

as soon as he struck the chair, and that witness shortly afterwards shook him in the chair, and knew he was unconscious. The prisoner's counsel objected to the evidence of the conversation between Cram and the deceased, under the circumstances above narrated. The objection was overruled, and the prisoner excepted.

After verdict, the prisoner moved the court for a new trial, on the ground that the verdict was against the law and the evidence. The court refused to entertain the motion, deciding that it had no power to grant a new trial, the recorder at the same time remarking that he was "quite sure that no argument of counsel would induce him to grant him a new trial either upon error of law or of fact," and the prisoner excepted to the refusal to entertain a motion for a new trial. One other alleged error was relied upon by the plaintiff in error, viz: The refusal of the court to charge, "That in order to constitute murder in the first degree, the premeditation must have existed prior to the immediate occurrence which resulted in death." But the whole question here involved, including the construction of the act of 1862, defining the degrees of murder, was disposed of in the case of *Fitzgerrold v. People*, decided at March term (4 *Abb. Pr. N. S.*, 63), and will not be reconsidered here. The evidence showed that the prisoner had always been a quiet and peaceable man, and so far as appears, had lived pleasantly with his wife down to about the time of her death; that on St. Patrick's day, nine days before the event, the prisoner and his wife had both commenced to drink, and had both been constantly under the influence of liquor, down to the hour of the catastrophe. There is no evidence of any motive for the commission of the crime.

The first objection raised by the plaintiff in error, viz: to the refusal of the court to require the people to elect on which count of the indictment they would ask for a conviction, is untenable, as was said by Chancellor WALWORTH in *Kane v. People*, 8 *Wend.*, 203, "It is every day's practice to charge a felony in different ways in several counts for the purpose of reaching the evidence as it may

come out upon the trial," and "if the different counts are inserted in good faith for the purpose of making a single charge the court will not compel the prosecution to elect." I am not aware that the correctness of this practice has ever since that time been questioned.

The second objection, viz: that the court erred in admitting the testimony of the witness Cram to the conversation between himself and the prisoner's wife, I think is well taken. That conversation can not be evidence unless on the theory that it took place in the presence of the accused, and not merely in his bodily presence, but in his hearing and understanding. A declaration made in the presence of one unconscious from sleep or stupor, cannot be evidence against him, and that seems to have been the condition of the prisoner here. The learned judge below thought it was for the jury to say whether he was wholly unconscious or not, but the evidence on that point was uncontradicted, and to my mind seems positive. The witness says, he was very much intoxicated; that immediately upon coming into the room, he staggered over into a rocking-chair and went to sleep; that he appeared to be asleep, sound, solid; that as soon as he struck the chair he was gone; that about the same time, witness shook him in the chair and was satisfied he was unconscious. It is true the witness testifies, that soon after the conversation he told the prisoner to go to bed, and that he gets to bed with the assistance of the witness; but I have no doubt it was then that he shook him in his chair, and found such means necessary to rouse him sufficiently to be got to bed.

But aside from this condition of the prisoner, and whatever the degree of his stupor, the conversation was not even in his bodily presence. The fact, apparently overlooked by the learned judge below, is that the prisoner was in one room, and the interlocutors, the witness and the deceased, in an adjoining room. Cram had induced the deceased to go into his room adjoining that in which the prisoner and his wife lived, and lie down; he had gone in with her, and it was when he was about

to leave her there that the conversation took place. It is true he testifies that the door between the rooms was open, but there is no evidence of the position of the several parties relative to the door, nor of their distance from it, nor whether the tone of voice was such as could have been heard from one room to the other. Since, therefore, this conversation was not in any sense in the presence of the accused, it was clearly inadmissible; and, unless it appears that it cannot in any degree have operated to the prejudice of the prisoner, its admission is good ground for a new trial. Upon this point it seems to me that there can be no question. The evidence of the prisoner's guilt was wholly circumstantial; both the fact of killing and the design to effect death were required to be inferred from the circumstances mainly of opportunity and of the conduct of the prisoner, both before and after the event. Prominent among these were the facts of some threats uttered by the prisoner on the same day of the killing, though not in the presence of the deceased; and the evidence of the conversation with Cram certainly tended to show that the prisoner had previously made similar threats to the deceased herself, or had in some other way impressed her with fear of fatal violence at his hands. The language of Cram clearly indicates an apprehension in his mind that the prisoner entertained murderous purposes towards her; and it is not only impossible to say that this proof cannot have influenced the minds of the jury to the prejudice of the prisoner, but it is difficult to see how it can have failed to do so. In my opinion, the admission of this testimony was an error fatal to the trial.

The remaining objection of the plaintiff in error which I shall consider is, that the recorder erred in refusing to entertain a motion for a new trial. In the opinion below it is said, "The recorder denied this motion on its merits;"—but surely it is not possible to decide such a motion on its merits without entertaining it; and in this case the recorder distinctly refused to entertain the motion, on the ground that he had no power to grant it, although he added that if he had the power he would not exercise it.

There can be no doubt that the recorder was wrong in his opinion on the question of the power to grant a new trial. The act of 1859 (Laws of 1859, ch. 339, § 4) provides, "The courts of sessions of the several counties in this State shall have power to grant new trials upon the merits or for irregularities or on the ground of newly-discovered evidence in all cases tried before them." It is difficult to see how this provision could ever have been understood not to include the "court of general sessions of the peace, in and for the city and county of New York." And this court, in the case of *Lowenburg v. People* (27 *N. Y.*, 336), held that substantially the same language in another act did include that court. The question in that case arose under chapter 208 of the laws of the same year (Laws of 1859, chapter 208, § 1), — which provides, "It shall be lawful for the court of sessions of any county of this State, to continue its sittings at any term thereof, so long as it may be necessary," etc., etc., and the opinion in that case which upon this point seems to have been concurred in by the whole court, holds the following language, "The court of general sessions of the peace, in and for the city and county of New York, is but a court of sessions of the county of New York, and is designated in the act of 1859 by the words 'The court of sessions of any county of this State.' " There can be no question but that the designation in chapter 339 is equally inclusive with that in chapter 208, and consequently no question but that the court of general sessions of New York has the power to grant a new trial on the merits. Such being the case I cannot avoid the conclusion that a substantial right was denied the prisoner in this case, viz: the right to have his motion for a new trial heard by the court which tried him. I cannot think this motion was decided upon its merits. The remark of the recorder about not being induced to grant the motion, seems to have been a hasty declaration made without hearing counsel, and coupled in the same breath with the decisive announcement that he had no power to entertain the motion, nor am I prepared to say, as is said in the opinion below, that if the recorder had

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granted a new trial it would have been an error. I do not think an appellate court can decide what effect a review of the case might have had upon the judge who tried it, and who heard and saw all the witnesses.

If the prisoner had a right to move for a new trial, he had a right to have that motion heard and considered. That right was denied him ; and, in my opinion, that denial was error.

If the views which I have expressed upon the second and third objections of the plaintiff in error, as enumerated above, are correct, it follows that the judgment of the general term of the supreme court, and that of the general sessions, should be reversed, and a new trial granted.

Judgment reversed.

PEOPLE *ex rel.* NEWMAN *against* THE SAILOR'S SNUG HARBOR.

Supreme Court, First District ; Special Serm., Dec., 1868.

MANDAMUS.—EXPULSION OF INMATE OF ASYLUM.—TRIAL OF CHARGES.

Where the trustees of a charitable asylum are authorized to direct the administration of the trust and clothed with power to make necessary rules for its government, the action of the trustees or executive committee in investigating a charge, against an inmate, of a violation of the rules made by them, and in expelling him therefor, is subject to review by the supreme court.

Regulations of an asylum for aged seamen, which forbid inmates to leave the premises without permission from the governor or an assistant, and enjoin quiet demeanor at the table on pain of expulsion, are reasonable regulations, and an expulsion for breach of them is lawful.

In the absence of any provision of the charter or by-laws on the point, the court will not deem the governor of an asylum vested with the power to expel an inmate without the authority of the trustees, or at least of the executive committee.

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The accused inmate should have notice of the examination of the charges against him, and an opportunity of being heard.

Application for a mandamus.

This application was made in behalf of the relator, Charles Newman, for a peremptory mandamus, against the trustees of the Sailor's Snug Harbor, to restore the relator to his position as an inmate of that institution, with the privilege of all its franchises, from which he had been turned out by Thos. Melville—the governor and administrator of the Harbor—in the month of September last.

The relator filed a petition, and accompanied it with an affidavit relating the facts of his case. By this petition it appeared that the relator had been an inmate and beneficiary of the Harbor, an asylum for aged and invalid seamen, established under the will of Robert Richard Randall, by which will the testator bestowed twenty-two acres of land in the city of New York, for the purposes of founding a charitable institution for the support of aged, decrepid, and worn-out seamen. The board of trustees consists of the mayor, recorder, the president of the chamber of commerce, the president and vice-president of the Marine Society, the oldest Episcopalian minister and the oldest Presbyterian minister in New York, with their successors in office perpetually.

The petition stated that the governor had turned the relator out of Harbor by two policemen, and had refused to readmit him, because he, the relator, had defended himself when assaulted by Henry A. Curtis, a steward.

The court, on filing the petition *ex-parte*, ordered an alternative mandamus to issue to restore the relator, or to show cause.

The respondents showed cause alleging that, on the 11th of September, 1868, the relator had in the dining hall of the institution violently assaulted the steward Curtis by clinching him around the body, and tearing his vest and shirt, and that he had declared then and there in a

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loud voice that certain officers of the institution whom he named, were a set of liars, thieves and swindlers.

On the coming in of this answer, the relator filed an affidavit alleging that he was assaulted first at the table by Curtis. The respondents filed three affidavits, setting forth that the relator on other occasions had been guilty of gross acts of disobedience and disturbance while an inmate of the Harbor, and had twice been convicted of assaults and batteries in former times.

Some question was made as to the regularity of the way in which the affidavits were submitted, which, however, is not material to the decision.

Alanson Nash, for the relator.

J. L. Riker and *William Fullerton*, for the defendants.

SUTHERLAND, J.—By the will of the founder of the charity, the testamentary gift was to be used and applied for supporting the asylum or hospital “in such manner as the testamentary trustees, or a majority of them, may, from time to time, or their successors in office may, from time to time, *direct*.”

By the act incorporating the trustees, they have power to make all proper and necessary rules and regulations for the government of the corporation, not inconsistent with the constitution and laws of the United States, and of this State.

The 7th article or section of the 11th subdivision of the by-laws declares, among other things, that any inmate who shall be convicted “of leaving the premises, without permission from the governor, or one of the assistants, shall forfeit the benefit of the institution, and be expelled from it.”

By the 13th section or article of the same subdivision of the by-laws, “inmates are strictly forbidden to indulge in contention, or boisterous and disorderly conversation *at the table*, and are solemnly enjoined to demean themselves in a decorous manner, as becoming aged and honest seamen.”

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The 19th section or article of the same subdivision of the by-laws forbids any inmate leaving the institution without permission of the governor.

The return to the alternative writ of mandamus in this case, alleges, that the relator, an inmate of the asylum or hospital, was on the 11th of September, guilty of improper and disorderly conduct and conversation, at the breakfast table, by making grossly improper remarks to the steward, which are set out, and by violently assaulting the steward.

The return further states, that the steward reported this improper conduct to the governor of the institution, who afterwards dismissed the relator from the institution by the *direction of the executive committee thereof*.

The return further states, that the relator was notified of the time of the examination of his conduct by the executive committee; that the relator did not attend, alleging that he had to attend in New York city as a witness under a subpoena, and the return further alleges, that the relator was not in fact then under a subpoena to attend as a witness as he alleged.

The return refers to certain affidavits which were handed up with it, as verifying the facts stated in the return.

Since these papers were submitted, the counsel of the relator has handed me an affidavit of the relator, verified on November 30, alleging that on September 11, on the occasion referred to in the return, the steward first assaulted him, and that in the affray he did nothing more than was necessary to protect himself from, and get rid of, the assault of the steward. The relator does not deny in this affidavit, that he made use of the language charged in the return, on this occasion.

The by-laws which have been specified appear to me to be reasonable, and proper and valid. They appear to me to be authorized by the act of incorporation, and to be consistent with the administration of the charity which the founder of it had in view; but I am not willing to hold that the governor has the power to expel an inmate for a violation of either of the by-laws referred to, without the

authority of the trustees, or at least, of the trustees constituting the executive committee.

Probably intermediate the periods of the meetings of the trustees, the executive committee can act for them, in examining a charge of an alleged violation of a by-law.

The accused inmate should have reasonable notice of such examination, and an opportunity of being heard, of *exculpating* himself, and of disproving the charge.

Nor am I willing to concede, that the action and proceeding of the trustees, or of the executive committee, in investigating such a charge, is beyond the control of, or a review by, this court.

In this case, I am satisfied from the return and all the affidavits and papers submitted, that the allegations in the return as to the conduct and conversation of the relator on the 11th of September are substantially true; that the governor did not undertake to expel the relator without the direction of the trustees, or of the executive committee, that the governor reported the alleged misconduct and violation of the by-laws on the part of the relator to the trustees or executive committee, who examined into the truth of the charge, and directed the governor to expel the relator; and that the relator had reasonable notice of the time and place of such examination, but absented himself therefrom without a reasonable excuse.

Though I have been somewhat embarrassed in disposing of this case, from the manner in which the papers, affidavits, &c., have been submitted, yet I do not see how I can dispose of it otherwise than by dismissing the alternative writ, and denying the motion for the peremptory writ without costs.

Order accordingly.

BARKER *against* WHITE.*Court of Appeals, June Term, 1867.***COSTS IN EQUITABLE ACTIONS.—APPEAL.**

In an action of an equitable nature,—*e. g.*, by one member of a partnership to enforce against the other members, or the estate of a deceased member claims growing out of the partnership business,—a referee's finding of the facts is held conclusive, if there is any evidence to sustain it. The appellate court will not inquire into the weight of the evidence.

In such a case the award of costs is in the discretion of the referee, and the appellate court will not control that discretion, except perhaps, in case of its palpable abuse.

Where the plaintiff in such an action made two claims, and recovered the smaller one only, and the referee allowed him his costs and one-third of his disbursements, and charged him with the costs of the successful defendant,—*Held*, that the court of appeals would not interfere with this adjustment.

Appeal from a judgment.

This action was brought by William Barker, plaintiff, appellant, against William White and Freeman Clarke, administrators, and Phœbe Sherman, administratrix of George W. Sherman, deceased, defendants, respondents.

The plaintiff alleged that he was formerly a partner with the defendant White and with the decedent Sherman. That he lent the partnership \$1000, for which the firm gave him their note, which he still held. He also alleged that the decedent Sherman, having in his lifetime \$600 in his possession belonging to the firm, lent it to a third person on his individual responsibility, and promised to make it good to the firm, which he had not done; that the affairs of the partnership had never been settled, and he demanded an accounting and judgment for the amount due him.

The referee before whom the cause was tried, sustained the claim against the estate of the decedent Sherman, but not that upon the note ; and he allowed costs to White against the plaintiff but allowed the plaintiff costs against the estate of Sherman, except two-thirds of the disbursements. The supreme court at general term sustained the report, and approved of the apportionment of the costs, and affirmed the judgment. The plaintiff appealed.

W. R. & S. H. Stafford, for the appellant.

J. D. Pelton, for the respondents,—cited as to the merits, *Goddard v. Cutts*, 2 *Fairf.*, 440 ; 2 *Edw. on Prom. Notes*, 34 ; *Story on Prom. Notes*, § 190 ; *Schoonmaker v. Rooser*, 7 *Johns.*, 301.

BOCKES, J.—This action was in equity, by one member of a partnership to enforce certain claims against the other members, growing out of the firm business.

It was referred to a referee to hear and determine, who reported in favor of the plaintiff as to one claim, and against him as to the other ; and the referee adjusted the costs between the parties, by allowing them in part to the plaintiff, and in part against him to the defendants.

Judgment was entered as directed by the referee. The plaintiff appealed therefrom to the general term, in so far as his claim set forth in the complaint was disallowed, and also as to the adjudication of the question of costs. The judgment was affirmed at general term, and the plaintiff appealed to this court.

In the complaint the plaintiff charged that during the continuance of the partnership, one of the firm, George W. Sherman, now deceased, whose estate is represented in this action by his administratrix, had in his possession the sum of six hundred dollars, which belonged to the firm, and which sum he loaned to one Albert Rogers, on his own individual responsibility, promising to make the sum good to the firm ; that such sum had never been repaid to the firm ; and he claimed that Sherman's estate should be charged with this sum and interest.

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The referee found in favor of the plaintiff on this allegation, and allowed a recovery in his favor, and against Sherman's estate, for his proportion of the claim. In this determination of the referee the parties acquiesced, neither appealing therefrom. This branch of the case, therefore, requires no examination.

The plaintiff also charged in the complaint that during the continuance of the copartnership he lent and advanced to the firm, of his own individual funds, the sum of one thousand dollars, which sum was used in the partnership business, and that the firm gave him a promissory note therefor, dated "April 24, 1854," signed in the firm name, and that he still held the same, which was due and wholly unpaid; and he claimed that this sum should be charged against the members of the firm, respectively, in due proportion.

This allegation of the complaint was denied by the other parties; and they averred, on information and belief, that if any such paper existed it was made and placed in the plaintiff's hands for a special purpose, to which it was never in fact appropriated, and that it never had any legal existence as a valid instrument binding on the firm.

The litigation before the referee was confined principally to this branch of the case, and the appeal was brought to review the decision of the referee thereon.

The note described in the complaint, was produced by the plaintiff, and was put in evidence.

The signature was shown to be in the handwriting of Mr. White, a member of the firm.

The plaintiff gave evidence tending to prove that the note was given him for money loaned, as alleged in the complaint.

On the other hand, the evidence offered by the defendants tended strongly to contradict the plaintiff's case, and left it quite doubtful, if not entirely improbable, that the note was given under the circumstances and for the purpose asserted by the plaintiff. The evidence certainly made it a question of fact for the referee. He found em-

phatically against the plaintiff—that he did not lend or advance the \$1,000 to the firm, nor did the firm make and give him the firm note, as alleged in the complaint; nor was that sum due and owing to him from the copartnership; and while he found that the note was signed by the firm name, in form as stated in the complaint, yet he also further found that it was never held and owned by the plaintiff, as claimed by him. This finding of fact on the evidence must be held conclusive on the parties, and as a consequence determines the case against the plaintiff, in so far as he made a claim against the other members of the firm, or the note. His case was not sustained on this point of the litigation, and the judgment in that regard was properly affirmed by the general term.

No other question is raised on this appeal on the merits.

It is insisted hence that the referee erred in the adjustment of the costs between the parties. The action being in equity, the giving or withholding of costs was in the discretion of the referee. As a general rule, the court will not attempt to control that discretion on appeal; certainly not except in case of its palpable abuse.

Such is not this case.

The plaintiff failed in the action on the principal subject of the litigation; recovering, however, on one minor branch of it. He was allowed his costs of the action, excepting two-thirds of the disbursements, and was charged with the costs of White's defense.

We cannot see that the adjustment of costs between the parties was so unfair and inequitable as to require this court to interfere with the decision of the referee.

The judgment of the supreme court should be affirmed, with costs of appeal against the appellant.

GROVER, J.—None of the exceptions of the plaintiff to the admissibility of evidence were well taken. It was claimed by the plaintiff that he had loaned his firm, consisting of the parties to the suit, one thousand dollars, for which the note was given. The circumstances under

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which this note was presented by the plaintiff, his entire forgetfulness at the time as to the origin of the note, its consideration, or how he came by it, were calculated to create a doubt as to the truth of the story subsequently told by him—that he kept large sums of money in his house, in the custody of his wife, from which this money was taken. This story was of itself very suspicious. This rendered an inquiry into the pecuniary condition and dealing of the plaintiff, at about the time, admissible, for the purpose of showing whether the plaintiff had in fact any such sums of money as claimed by him. All the evidence excepted to was proper for this purpose. The question whether the plaintiff lent the thousand dollars to the firm, and took the note in question, therefore, was one of fact ; and if the evidence was at all conflicting, the decision of the referee cannot be reviewed in this court. It was undisputed that the signature of the firm to the note was in the handwriting of the defendant White, one of the firm. Had there been no other evidence, it would have presented a question of law merely ; and, had the referee found the fact contrary to the undisputed evidence, it would have been a legal error that this court would correct upon appeal. But there was other evidence tending strongly to show that the note was not valid against the firm.

In this class of cases this court has no power to inquire into the weight of the evidence, and determine whether the court below has come to a correct conclusion thereon. That can only be done by the supreme court. In this case the plaintiff concedes that costs were in the discretion of the court.

There is no evidence of abuse in its exercise. There is no ground for the interference of this court with the disposition in this respect made by the referee.

The judgment appealed from should be affirmed.

All concurred with the foregoing opinions.

Judgment affirmed.

SHAW *against* SMITH.*Court of Appeals, January Term, 1867.*

APPEAL.—EXCEPTIONS TO REPORT.—DAMAGES ON AFFIRMANCE.

In an action of an equitable nature, to close the affairs of a copartnership, the court of appeals can only review questions of law raised in the court below upon rulings to which proper exceptions were taken.

Exceptions which present questions of fact only, or relating to the admissibility of evidence, without stating the ground of objection, are not available.

In such a case, however, the court affirmed the judgment without awarding damages on the appeal to the respondent, in consideration of the appellant's case being a hard one.

Appeal from a judgment.

H. D. Lapaugh, for appellant.

A. Gibbs, for respondent.

GROVER, J.—In looking over the papers in this case, I am unable to discover any question so presented as to enable this court to notice it. This court can in this class of cases only review questions of law raised in the court below to the rulings, upon which proper exceptions were taken. The exceptions taken to the report of the referee present questions of fact only. Upon the hearing before the referee, certain questions were objected to by the plaintiff's counsel, which objections were overruled by the referee, to which rulings the plaintiff's counsel excepted, but no grounds for any of the objections were stated. Such general objections, stating no ground therefor, are not available upon review. In short, they amount to nothing, only to lumber up the case.

The judgment appealed from must be affirmed, and I should be in favor of giving damages to the respondent,
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was I not impressed by a perusal of the case that the appellant had had rather a hard measure applied to his case, probably resulting from a failure in calling attention to the point. The respondent appears to have got all the bad debts for nothing, and I apprehend a larger judgment than a close examination of the accounts would entitle him to. But there being no exceptions on these points, this court can afford no redress, should it find the judgment incorrect in these particulars.

All the judges concurred.

Judgment affirmed.

*affirmed
6 Dec. 29.
174.*

PALMER *against* DE WITT.

New York Superior Court ; Special Term, December, 1868.

INJUNCTION. — LITERARY PROPERTY. — UNCOPYRIGHTED DRAMA.

The common law right of the author of an unpublished manuscript to its exclusive use, pertains only to the *unpublished* work ; and after unrestricted publication to the world, neither the author, whether a foreign or a domestic writer, nor his assignee, can assert an exclusive right to property, in its future use and publication.

After an uncopyrighted drama has been, with the sanction of the author, represented upon the stage, without any restrictions or conditions imposed upon the spectators, the court will not, at the suit either of the author or of his assignee, enjoin from reproducing the same drama, other persons who have obtained copies by seeing and hearing such representation.*

Motion to dissolve an injunction.

This action was brought by Henry D. Palmer against Robert M. De Witt to restrain the defendant from print-

* Compare *Keene v. Wheatley*, 9 *Am. Law Reg.*, 44 ; and *Roberts v. Myers*, 13 *Law Reporter*, 400, 401 ; and *Daly v. Palmer*, an unreported case, of which we give the substance in note on page 134, *post*.

ing and selling printed copies of a comedy called "Play," of which the plaintiff claimed to be proprietor, by virtue of an assignment from the author.

The motion was made upon the complaint and answer. It was alleged in the complaint, "that prior to the 1st of Febuary, 1868, one T. W. Robertson, of London, England, an eminent author, was the composer of a comedy called 'Play,' and assigned to the plaintiff the exclusive right of enacting, representing upon the stage, printing and publishing, or causing, licensing or permitting to be enacted, performed, represented or produced upon the stage throughout the United States, in and to the said comedy, together with all the author's rights and privileges therein and thereto throughout the United States, and all benefits and advantages to be derived therefrom." That at the time of such assignment, purchase and sale, the said Robertson had a great reputation as a dramatic author, having produced some of the finest comedies introduced on the modern stage; among them the comedies "Caste," "Ours," and "Society" had been eminently successful.

It was also alleged that any new comedy from such an author was of very great value to the exclusive proprietor thereof, and the plaintiff, in the purchase of the comedy of "Play," anticipated great pecuniary advantage from and by reason of the celebrity and popularity of its author. And the plaintiff averred that at the time of the purchase of "Play," on Feb. 1, 1868, the said comedy was an unpublished composition, adapted and designed for scenic representation, and was of great literary and dramatic merit; that it had never been at that time, nor had been since, printed or published in print by the plaintiff or its author, or by any one under his sanction, permission or consent, or that of either of them, and at that time had never been represented upon any stage; that its first performance upon any stage was on February 15, 1868, in the city of London, at the Prince of Wales' Theatre, and under the sanction of the author, but that the author did not thereby confer upon or abandon to the defendant, or

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to any other person, the right or privilege of printing his comedy, or otherwise interfering with his right of property therein ; that the plaintiff, nor the author, had never consented to the printing and publishing, or sale thereof ; that on or about February 10, plaintiff received a full and complete manuscript copy of the said comedy, and still owned the same, and kept it unprinted and unpublished, and was now engaged in licensing the right to perform and enact the same ; that on February 18, 1868, he published in the New York *Herald* a notice of his right of ownership in said play, and had the same repeated in said newspaper tri-weekly during the months of February and March ; that about March 25, 1868, the defendant, a publisher in the city of New York, without the knowledge or consent of the plaintiff, and in willful disregard of his rights as proprietor of said play, did print, publish and sell printed copies of the said play, and still continued to do so, to the plaintiff's damage ; and the plaintiff alleged that copies of the play so printed and sold were identical with the comedy purchased by the plaintiff from the author ; that the plaintiff was liable to sustain irreparable injury by reason of the facility which defendant had afforded to managers and actors to produce said comedy by means of such printed copies.

The answer denied the plaintiff's proprietorship, and any willful intention to injure the plaintiff ; claimed that the play was publicly represented upon the stage in London a great number of times, and that the defendant obtained the play from those who saw and heard the representation as spectators, and that there was no prohibition in the theatres where the same was heard, nor upon the tickets of entry, against carrying away the same in the memory by those who saw and heard it.

A temporary injunction having been granted, the defendant now moved to dissolve it.

Ira D. Warren, for the motion.

William D. Booth, opposed.

GARVIN, J.—The plaintiff in this action claims to be the assignee, purchaser and sole, and exclusive owner and proprietor throughout the United States of a comedy written by T. W. Robertson, an eminent English dramatic author, entitled “Play.” The plaintiff purchased the comedy on or about February 1, 1868, and received the copy of said play in manuscript on or about February 10, and alleges the same has never been printed or published with the consent of the plaintiff or the author. That it was represented for the first time on the stage in London, at the Prince of Wales’ Theatre, on February 15, 1868. That during the latter part of February and the whole of March, the plaintiff had a notice published in the New York *Herald* tri-weekly, of his right of ownership in the play. That the defendant, on March 25, in willful disregard of the rights of plaintiff, and without his consent, published and sold identical copies of “Play,” thus owned by the plaintiff, to his great damage and irreparable injury, and depriving him of all advantages and profits to be made thereby.

It is not pretended, that either the plaintiff or the author had an American copyright in the comedy in question; neither could either have such a right—a foreign copyright would not avail the plaintiff here. There can be no copyright in a published work at common law; copyright exists only by statute (*Wheaton v. Peters*, 8 *Pet.*, 499). The plaintiff must, therefore, stand upon his common law right of literary property in “Play,” as the assignee of the author as to its exclusive proprietorship in the United States, with the right to enforce it as against others who claim to publish and circulate for their own profit and advantage.

Two principles are well settled upon authority: *First*. The author of an unpublished manuscript has in it at common law an exclusive right of property; the violation of which may justly be protected by injunction. This is the language of the text writers, and the decisions upon the subject are uniform and clear (8 *Pet.*, 591; 4 *Duer*, 385). *Second*. This exclusive right pertains only to the unpub-

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lished manuscript, without copyright protection; but after unrestricted publication to the world, neither the author nor his assignee, whether a foreign or domestic writer, can assert an exclusive right to property in the future use and publication of the composition.*

* In the case of *DALY against PALMER* (*United States Circuit Court, Southern District of New York, in equity, December, 1868*), it was—*Held*, that a written work consisting wholly of directions set in order for conveying the ideas of an author on a stage by actors, is as much a dramatic composition, within the protection of the copyright act, as if language or dialogue were used; and that the author, having a copyright in his drama, was entitled to protection in respect to a substantial, material, original part thereof, although the act of 1856,—providing for copyright of dramatic composition,—does not, like the act of 1831, use the words “in whole or in part;” and that the sale as well as the representation of the drama, might be enjoined.

The cause came before the court on a motion for an injunction.

The action was brought by Augustin Daly against Henry D. Palmer and Henry C. Jarrett, to restrain the defendants from the public performance and representation, and from the sale for dramatic representation, of a scene called the “railroad scene” in a play called “After Dark.” The plaintiff was by profession a dramatic author, his business being to compose, write and produce on the theatrical stage dramatic compositions, commonly called plays. The defendants were the managers of a public place of theatrical amusement, in the city of New York, called Niblo's Garden. Before August 1, 1867, the plaintiff composed and wrote a dramatic composition called “Under the Gaslight,” and on that day he took the proper steps to secure to himself a copyright for the composition, under the provisions of the act of February 3, 1831 (4 U. S. Stat. at L., 436), by depositing before publication a printed copy of the title of the composition, as author and proprietor, in the clerk's office of the district court of the southern district of New York, where he resided at the time. The composition was afterward printed and published, and within three months from its publication he caused a copy of it, as printed and published, to be delivered to said clerk. He also gave information of copyright being secured by causing to be printed and inserted in the several copies published the words prescribed by the fifth section of the act.

The plaintiff's bill alleged that Dion Boucicault, another dramatic author, had procured a copy of plaintiff's drama, and had plagiarized the railroad scene in a play prepared by him under the title of “After Dark,” and that the defendants were about to perform such play, and the defendant Palmer was about to sell copies to other managers in the United States.

The important question in this case is, whether there was a publication or communication of the comedy by the author or his assignee.

Every communication, says CADWALADER, in *Keene v. Clark*, of a knowledge of the contents, unless restricted, of

BLATCHFORD, J., in rendering the opinion of the court, stated the law in the following language :

"The act of 1831 (4 U. S. Stat. at L., 436), confers upon the author and proprietor of a dramatic composition, duly copyrighted, the sole right of printing, reprinting, publishing and vending such composition, in whole or in part, for the term of twenty-eight years from the time of recording the title of such composition, in the manner directed by the act. The act of August 18, 1856 (11 U. S. Stat. at L., 138), provides that any copyright thereafter granted under the laws of the United States 'to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform or represent the same, or cause it to be acted, performed or represented. on any stage or public place during the whole period for which the copyright is obtained.'

* * * * *

"The first inquiry is, what is meant by the act of 1856 by a 'dramatic composition;' what is meant by the 'public representation' of a dramatic composition, and what is meant by the right to 'act, perform or represent' a dramatic composition, on a 'stage or public place.' The act of 1856 confers on the author or proprietor of a copyrighted 'dramatic composition, designed or suited for public representation,' the sole right of acting, performing or representing the same on a stage or public place, in addition to the sole right to print and publish such composition. The latter right must be considered as being conferred by the act of 1831, for although that act only speaks of a copyright for a 'book or books, map, chart, musical composition, print, cut or engraving,' yet, under the language of the act of 1856, a 'dramatic composition, designed or suited for public representation,' must be regarded as embraced within the act of 1831.

"A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented in dialogue and action by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed or represented; and if the representation is in public, it is a public representation. To act, in the sense of the statute, is to represent as real by countenance, voice, or ges-

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a manuscript, is more or less a publication. And this able judge further says, "an act which renders the contents of a manuscript in any mode or degree an addition to the store of human knowledge is a publication." It has been expressly held by this court, in *Keene v. Clark*,*

* Reported in 5 *Rob.*, 38. Some other points decided in that case are reported in 2 *Abb. Pr. N. S.*, 341.

ture, that which is not real. A character in a play, who goes through with a series of events on the stage without speaking—if such be his part in the play—is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words. A written work, consisting wholly of directions set in order for conveying the ideas of the author on a stage or public place by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if the language or dialogue were used in it to convey some of the ideas.

"The 'railroad scene' in the plaintiff's play is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition as those parts of it which are represented by voice. This is true also of the 'railroad scene' in 'After Dark.' Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of anything that is spoken. The important dramatic effect in both plays is produced by the movements and gestures which are prescribed and set in order so as to be read, and which are contained within parentheses. The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator by those parts of the scene which are directed to be represented by movement and gesture.

"The series of events so represented and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parenthesis in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress; a railroad track with the body of B. placed across it in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A., from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track,

that at common law "the author or proprietor of an uncopyrighted literary composition parts with the right to the exclusive use and enjoyment of its contents by communicating them to others," without some concomitant reservation expressed, or implied from the circumstances.

and the moving of the body of B. by A. from the impending danger, a moment before the train rushes by.

"In both of the plays the idea is conveyed that B. is placed intentionally on the track with the purpose of having him killed. Such idea is in the plaintiff's play conveyed by the joint medium of language and movements which are the result of prescribed directions, while in Boucicault's play it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes are identical. Both are dramatic compositions, designed or suited for public representations.

"It is true that in one A. is a woman, and in the other A. is a man; that in one A. is confined in a surface railroad station shed, and in the other A. is confined in a cellar abutting on the track; that in one A. uses an axe, and in the other A. uses an iron bar; that in one A. breaks down a door, and in the other A. enlarges a circular hole; that in one B. is conscious, and is fastened to the rails by a rope, and in the other B. is insensible, and is not fastened; and that in one there is a good deal of dialogue during the scene, and in the other only a soliloquy by A., and no dialogue. But the two scenes are identical in substance as written dramatic compositions in the particulars in which the plaintiff alleges that what he has invented and set in order in the scene has been appropriated by Boucicault."

The learned judge then cited at length the views expressed by Lord LYNDBURST, in the case of *D'Almaine v. Boosey*, 1 *Young & C. (Exch.)*, 288 (a case of musical copyright), which was cited and approved by Mr. Justice NELSON, in the case of *Jollie v. Jaques*, 1 *Blatchf.*, 618-625. Approving these views as being eminently sound and just, and applicable to the case of a dramatic composition designed for public representation, his honor proceeded as follows:—

"Such a composition when represented excites emotions and imparts impressions, not merely through the medium of the ear, as music does, but through the medium of the eye as well as the ear. Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language, which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery

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This is holding, in other words, that an author has no exclusive property in a published work, or one communicated to the public, except under some statute (*Wheaton v. Peters*, 8 *Pet.*, 591; *Bartlett v. Crittenden*, 5 *McLean*, 32). The only question, therefore, is that of publica-

or mechanical appliances, or of what is called in the language of the stage, scenery, or the work of the scene painter.

"Now, in consonance with the principles laid down by Lord LYNDBURST, the plaintiff is as much entitled to protection in respect of a substantial and material original part of his 'railroad scene' as he is in respect of the whole. Under the act of 1856, construed in connection with the act of 1831, he is entitled to be protected against piracy, in whole or in part, by representation, as well as by printing, publishing and vending. Although the act of 1831, in regard to printing, publishing and vending, uses the words 'in whole or in part,' and the act of 1856, in regard to representing, does not use those words, yet the act of 1856, by referring, as it does, to the right conferred by the act of 1831 as the 'sole right to print and publish' the copyrighted composition, when such right is on the face of the act of 1831, the sole right to print and publish 'in whole or in part,' and by then conferring 'the sole right also to act, perform or represent the same, or cause it to be acted, performed or represented on any stage or public place,' must be held to confer the right to represent in whole or in part.

* * * * *

"As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so in the case of the dramatic composition, designed or suited for representation, the series of events directed in writing by the author in any particular scene is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters, who use different language from the characters and language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention—that which required genius to construct it and set it in order—remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events when represented on the stage, although performed by new and different characters using different language, is recognized by the spectator through any of the senses to which the representation is addressed, as conveying

tion. As this question is presented, the fact of foreign authorship can make no difference.

There being no copyright interest, plaintiff's case must rest upon his common law rights. After publication his exclusive right ceases to exist. Such publication may be either by words, by writing, printing in newspapers, magazines, or by lectures, sermons (oral or written), or by dramatic representation. If, in any of these modes, the public become possessed of the contents of a manuscript, without restrictions, express or implied, it must be regarded as such a publication as divests the author of an exclusive property in the work, whatever it may be.

It is averred in the complaint that the comedy in question was represented on the stage on or about the 15th of February, 1868, in London. This one fact brings the case clearly within the rule laid down in the case heretofore referred to in this court. Doubtless, there was a series of representations of the same play. There is no pretense of any restriction upon its use by those who witnessed its representation; a dramatic representation is publication or communication of the contents. If this is not a publica-

substantially the same impression to, and exciting the same emotions in the mind, in the same sequence or order.

* * * * *

"The true test as to whether there is piracy or not is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a *bona fide* original compilation, made up from common materials and common sources, with resemblances which are merely accidental, or result from the nature of the subject (*Emerson v. Davies*, 3 *Story C. Ct.*, 768, 793). Nothing that has been adduced on the part of the defendants affects the validity of the plaintiff's copyright on the question of the originality and novelty of the 'railroad scene' in his play. The sale of Boucicault's play to other persons, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

"An injunction must, therefore, issue, restraining the defendants from the public performance or representation, and from the sale for public performance or representation, of the 'railroad scene' in the play of 'After Dark,' or of any scene in substance the same as the 'railroad scene' in either of the two plays, as such scene is herein defined."

tion, copyright would be worthless, compared with the common law property in and perpetual right to exclusive representation of any product of the author. The first is limited to a few years, the latter would be perpetual; copyright is confined to the citizen and resident, the other applies to all. There is no valuable exclusive right in the works of a foreign author that can be enforced, not even in their republication, though by the custom of trade other publishers refrain from publishing rival editions thereof.

The plaintiff avers a representation on the stage in London, and the defendant insists in his answer that "Play" was publicly represented upon the stage, in London, a great number of times, and that the defendant obtained it from those who saw and heard the representation as spectators, and that there was no prohibition in the theatre where the same was heard, nor upon the tickets of entry, against carrying it away in the memory. The defendant also denies any willful intention to injure the plaintiff. We must, therefore, assume the defendant possessed himself of "Play" by means not unlawful in themselves, through those who saw and heard it represented in London, and published it in this country. If the defendant had obtained a copy from a printed book, magazine or newspaper, there can be no doubt of his legal right to multiply copies and sell them to the public. How can there be any doubt of the same right in cases where he obtains the contents from those who learn and carry away in memory a comedy or play from seeing and hearing its unrestricted and unconditional representation upon the stage?

All our national legislation, as well as that proposed for the benefit of foreign authors, proceeds upon the conceded principle that the work of a foreign author brought here may be appropriated by any person without any compensation whatever being made to the author. This was conceded by the committee of the senate in the report made in 1837, by its distinguished chairman, Mr. Clay, when an attempt was made to confer the benefits of our

laws upon the British and French authors. A bill accompanied the report, which failed. The enactments of Congress, passed in 1831, declared in effect that the only person entitled to copyright shall be such authors as are citizens and residents, and their assignees, "and if the assignee takes his title before the author has come to reside, he takes from a person who is not within the privilege of the statute, and has nothing to confer" (*Curtis on Copyright*, 143). The ninth section of the same act prohibits the publication of manuscripts without consent, and authorizes the courts by injunction to restrain such publication of any manuscript ; but the eighth section expressly excludes that section from any application to works written or composed by any person not a citizen nor resident of the United States ; thus recognizing the principle in this country that when the foreign author communicates, without restrictions, the contents of his manuscript or work to others, he divests himself of his exclusive property in it. In other words, "the statute has taken away the common law rights derivable from a non-resident alien as soon as the work is published" (*Curtis on Copyright*, 148). All the title the assignee can have is the common law title to an unpublished manuscript, but in one lawfully made public he has no other title than such as the author possessed after publication.

The main question in this case was substantially decided by this court in the case of *Keene v. Clark* (5 *Rob.*, 38) ; there it was expressly held, "where the spectators of a public performance have not entered into some express or implied understanding with its proprietor, limiting the use they may make of the knowledge derived from being present at such performance, they cannot be restrained as to the use by them of so much of it as they can retain and carry away in their memory."

I do not see how this case can be distinguished in principle from that rule thus laid down. The plaintiff has failed to make a case for the interference of the court by injunction. Courts must administer the law as they find it. This may be a case of great hardship for the

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plaintiff, but the remedy is to be found in national legislation. The same difficulty exists in relation to the republication of the uncopyrighted works of those who have enriched the world by their contribution to the literature of the republic of letters, as well as to those who publish editions of foreign authors ; yet these defects in the legislation of the country have continued for many years. In the absence of any international law of copyright it is difficult to see how foreign authors, their assignees, or publishers of foreign literature, can be protected.

The injunction order in this case must be dissolved with \$10 costs.

HAYWARD *against* THE LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE CO.

Court of Appeals, June Term, 1867.

INSURANCE.—WHAT IS LOSS BY FIRE.—EXPLOSION OF STEAM ENGINE.

A provision in a policy of fire insurance, exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy, as well as any external explosion.*

The exception of fire caused by explosion is not inconsistent with the fact that the engine itself was insured against fire.

The rule that, in case of repugnancy between the written and the printed parts of the policy, the written shall prevail over the printed part, is not applicable in such a case. In such cases the inquiry always is, is there any repugnancy between the exception and the scope of the undertaking in the policy ? If not, effect is to be given to both the written and printed parts according to the ordinary rules of construction.

* This case may be regarded as overruling the case of the same plaintiff against the Northwestern Insurance Company, decided in the supreme court in 1864, and reported in 19 *Abb. Pr.*, 116.

The case of Harper v. Albany Mutual Insurance Co., 17 N. Y., 194,—explained and distinguished.

Appeal from a judgment.

This action was brought in the New York superior court, by Nathaniel Hayward against the Liverpool and London Fire and Life Insurance Co., to recover on a policy of insurance against fire. Among the articles specified in the written part of the policy, as insured were “machinery, tools, steam engine and shafting contained in building No. 1.”

In the body of the *printed* part of the policy was the following proviso or condition:

“Provided always, and it is hereby declared and agreed that this company shall not be liable to make good *any loss or damage by fire, which shall happen or arise from any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, or by any explosion, earthquake, or burricane, and the policy shall remain suspended and of no effect in respect to any loss or damage which shall happen or arise during the period of any of these contingencies.*”

Among the conditions and stipulations printed upon and referred to in the policy, was the following:

“That this company will not be answerable for any loss or damage by fire occasioned by any invasion, foreign enemy, insurrection, civil commotion, riot, or any military or usurped power whatsoever. Neither will this company be answerable for loss or damage to stock or goods while undergoing any process in which the application of fire heat is necessary, *nor for loss or damage by explosion of any kind.*”

The superior court held that the exception exonerated the company, and gave judgment for the defendants. Their decision, which was now affirmed by the court of appeals, is reported in 7 Bosw., 385.

Luther R. Marsh and O. W. Sturtevant, cited the case of Harper v. Albany Ins. Co. 17 N. Y., 194.

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Alexander Hamilton, Jr., for the defendants, respondents,—cited and relied on *St. John v. Am. Mutual Ins. Co.*, 11 *N. Y.*, 516 ; and insisted that the case of *Harper v. Albany Ins. Co.* was not in point.

PARKER, J.—The provision in a policy that a company will not be liable to make good any loss or damage by fire which shall happen or arise by any explosion, repeated in the conditions appended, and referred to in the policy, must, I think, be taken to include an explosion of the steam engine insured, as well as any external explosion.

There is no inconsistency in such construction with the fact that the engine itself was insured against fire. The company might well say : We will insure your factory, engine included, against fire produced from every cause, except an explosion of the engine. So far from there being any inconsistency in this, it is impossible to say that it was not a wise and reasonable provision, intended to induce carefulness in the management of the engine, and to refuse the risk of carelessness in its use. It is said the defendant has been paid an extra price for the risk caused by the engine. Still, the exception in the risk of its explosion is not inconsistent with that fact. Undoubtedly the use of a steam engine, and without respect to its liability to explode, increases the hazard of loss by fire to a building in various ways, which sufficiently accounts for the extra charge for insurance, where one is used. In the case of *Harper v. Albany Mutual Ins. Co.* (17 *N. Y.*, 194), relied upon by the defendant, the doctrine affirmed was, that in construing a policy of insurance, the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, so far as can be ; but in case of repugnancy between them, the written part shall prevail over the printed part ; and the principle was illustrated by the learned judge who gave the opinion of the court, in the following manner ; “ When the insurance is directly upon the stock in trade, as, for example, in the business of manufacturing and sale of cam-

phene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and indorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous."

The case at bar is very different from that of *Harper v. Albany Mutual Insurance Co.*; and as we have seen that there is no repugnancy between the insurance of the engine against loss by fire and the exception of loss and damage by fire occasioned by the explosion of the engine, it is not within the principle of that case.

The inquiry always is, is there between the exception and the scope of the undertaking in the policy any repugnancy? If not, in construing the policy the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, according to the ordinary rules of construing written contents.

I am of the opinion that the judgment of the superior court is right, and should be affirmed.

All the judges concurred.

Judgment affirmed.

WARD *against* WARD.

Supreme Court, First District; Special Term, Dec., 1868.

PLEADING.—COMPLAINT.—DEMURRER.

The remedy for superfluous matter in a complaint,—such as an allegation of abandonment, in an action for divorce on the ground of adultery,—is by motion, not by demurrer, although such matter be stated in a form appropriate to a separate cause of action.

Demurrer to amended complaint.

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The action was brought by John A. Ward against Amelia C. Ward. The plaintiff in the first four paragraphs of the amended complaint, averred that the parties were married, had one child, and that the defendant had without his consent abandoned him. The fifth paragraph "for a further cause of action," averred the adultery of the defendant. A general prayer for judgment granting a divorce *a vinculo*, and the custody of the child, closed the complaint.

The defendant demurred on the grounds—1. That several *alleged* causes of action were improperly united. 2. That the abandonment did not constitute a valid cause of action.

Elbridge T. Gerry, for the demurrer.—I. Assuming both the alleged abandonment and adultery to be valid causes of action, they are improperly united (*Pomeroy v. Pomeroy*, 1 *Johns. Ch.*, 606; *Griffin v. Griffin*, 23 *How. Pr.*, 183; *McNamara v. McNamara*, 2 *Hill.*, 547; *Henry v. Henry*, 17 *Abb. Pr.*, 411).

II. If the plaintiff could not originally unite these two alleged causes, he cannot join them by amendment (*Sheldon v. Adams*, 18 *Abb. Pr.*, 405).

III. The defect here complained of can only be taken advantage of *by demurrer*, not by motion to strike out (*Hoffman v. Hoffman*, 35 *How. Pr.*, 384; *Quintard v. Newton*, 5 *Rob.*, 72, in point).

IV. The second ground of demurrer is also well taken. The statute does not authorize *a husband* to sue for abandonment (3 *Rev. Stat.*, 5 ed., 238, subd. 3 of § 64).

V. The demurrers are not inconsistent. The Code authorizes the joinder of the two grounds in one demurrer (*Code*, §§ 144, 145).

L. B. Wells, for the plaintiff, opposed.—I. The demurrer is not well taken because, the complaint does state one valid cause of action,—*e. g.*, adultery,—to warrant the relief asked (11 *Paige*, 161; 5 *Id.*, 17; 4 *Sandf.*, 464; 18 *Ala.*, 479; 1 *Smed. & Marsh. Ch.*, 17; 21 *How. Pr.*, 9; *Meyer v. Van Collem*, 7 *Abb. Pr.*, 222;

28 *Barb.*, 230 ; *Durant v. Gardner*, 19 *How. Pr.*, 94 ; 10 *Abb. Pr.*, 445.)

II. The second ground of demurrer is only to a portion of the cause of action, and therefore untenable (*Lord v. Vreeland*, 15 *Abb. Pr.*, 122 ; 24 *How. Pr.*, 316.)

III. The allegations of abandonment were only inserted to show a stronger right to the custody of the child. The words "further cause of action" do not help the demurrer (14 *How. Pr.*, 456).

INGRAHAM, J.—There is but one cause of action stated in this complaint, viz: the adultery. The allegation that the defendant has abandoned and deserted her husband is no ground of divorce, and is improperly inserted in the complaint, but it is not stated as a cause of action, nor is any relief asked for on account of that fact.

The statement in the 5th paragraph, "that for a further cause of action he states, &c.," does not show that there are two causes in the complaint (*Hillman v. Hillman*, 14 *How.*, 456).

The proper rule is laid down in *Meyer v. Lent*, 7 *Abb. Pr.*, 225, viz: that in such cases the remedy is by motion, and not by demurrer.

Judgment for plaintiff on demurrer, with leave to answer, &c., and without prejudice to a motion to strike out.

KENNEDY *against* THE PEOPLE.

Court of Appeals ; March Term, 1868.

INDICTMENT AND GENERAL VERDICT.—AVERRING
ALIAS.—EVIDENCE OF MOTIVES TO CRIME.—
OPINIONS OF SURGICAL WITNESSES.

A general verdict of guilty, rendered upon a common law indictment for murder, authorizes, under the laws of this State, a judgment and sentence for murder in the first degree.

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When a person is known by two names, and the pleader, for greater certainty, deems it necessary to aver such fact in an indictment, it is immaterial which of the two names is first stated, and which was the real name. It is sufficient if the pleading designates the names by which the person intended may be known with certainty, irrespective of the priority of the names in the statement.

The use of the word "*alias*" instead of "*alias dictus*," or "otherwise called," constitutes no uncertainty in an indictment.

On the trial of an indictment for murder, although the question whether the deceased had or had not money in his possession at the time of his death, is material, and evidence that money had been paid him shortly before that time may be proper, a declaration, made by him some weeks before the killing, that he had no money, is not admissible.

In connection with other testimony, evidence that the prisoner, at about the time of the killing, proposed to purchase land is, in its nature, competent, and may be admissible as slight evidence that the prisoner had a motive to the crime in the want of money.

Although medical witnesses are competent to speak, as experts, of the power of resistance of the skull, and so of the force requisite to break it, their opinions as to the position of the body when struck, inferred from the nature of the wound, are not admissible. This is not a matter lying peculiarly within the skill and experience of such witnesses.

Writ of error.

At a court of oyer and terminer for the county of St. Lawrence, John Kennedy, the plaintiff in error, was indicted, tried, found guilty, and sentenced to be hung for murder. The indictment charged that on February 10, 1867, John Kennedy (the plaintiff in error), at the town of Dekalb, in the said county, &c., "in and upon one Thomas Hand, *alias* Thomas Jackson, in the peace of the people," &c., "willfully and feloniously, deliberately and premeditatedly did make an assault," and "with a certain axe which he, the said John Kennedy, in his hands then and there had and held, him, the said Thomas Hand, *alias* Thomas Jackson, in and upon the head of him, the said Thomas Hand, *alias* Thomas Jackson, then and there willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, did beat, strike, stab, cut and wound, giving unto the said Thomas Hand, *alias* Thomas Jackson, then and there, with the axe aforesaid, in and upon the head . . one mortal wound of the breadth, &c.,

. . of which said mortal wound he, the said Thomas Hand, *alias* Thomas Jackson, on," &c., at, &c., "did die ; and so the jurors aforesaid do say that he, the said John Kennedy, him, the said Thomas Hand, *alias* Thomas Jackson, in manner and form and by means aforesaid, at, &c., "on the day and year aforesaid, willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, did kill and murder against the form of the statute," &c., "and against the peace," &c.

When the case was brought on for trial the counsel for the prisoner moved to quash the indictment, on various grounds, which were overruled, and exception was taken.

The objections then taken, which were now insisted upon in this court were, 1. That the indictment was bad for duplicity, "for the reason that it charges the prisoner with the murder of Thomas Hand, *alias* Thomas Jackson ;" and 2. That if it was intended to charge that Thomas Hand was also known by the name of Thomas Jackson, then the words in the indictment should have been "Thomas Hand, *alias dictus* Thomas Jackson."

On the the trial the first witness examined was Dr. John R. Furness, a physician and surgeon, and coroner of the county. He was called to examine the body of the deceased : found the body in the cellar of the house in which the deceased lived alone. He described the wounds upon the head, the room in which was the stove, the furniture, and the bed of the deceased, the bloody axe found near the stove, the blood on the floor, and the trap-door, at the foot of the bed under which lay the body. He gave, with great particularity, the form, extent, and depth of two wounds—one on the left-hand side of the back part of the head, and the other on the top of the head ; gave his opinion as to the shape of the instrument by which the wounds were made, and the direction of the blows, and their effect, thus : The shape of the instrument that created the wounds I cannot say further than it was a blunt instrument ; each of those wounds cut arteries. The wound on the back part of the head must have cut a superficial artery—a

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branch of the occipital artery ; and the wound on the top of the head must have injured arteries—not cut them, but torn them. Blood would flow instantly on receipt of the blow inflicting those injuries. The instrument that inflicted the blow back of the ear must have been longer than it was wide, and blunt. It injured the back part of the head, on the left side back of the ear, and the bone back of the ear. The skin was raised slightly, as if peeled a little from the bone, leaving a gash or open wound of about half an inch wide, and the depth was as far as to the bone. Striking the scalp from above and backward would make such a gash—in a vertical or slanting direction : a blow with a blunt instrument.”

The counsel for the people thereupon inquired : “ In what position do you judge the body to have been when it received the blow upon the side of the head ? ”

The question was objected to as incompetent, and as calling for the opinion of the witness, instead of facts. The objection was overruled, and an exception taken on behalf of the prisoner.

The witness answered : “ I should judge that he was in a stooping position. It is only a matter of opinion, but I should think probably that he was sitting in a chair, or on the side of the bed, and stooped with his head upon his hands, or in some such position.”

Question : “ In what position would you think he was when the wound on the top of the head was given ? ”

This question was in like manner objected to, but was allowed, and exception was taken.

Answer : “ Probably lying down, either on his back or face. He might have been lying in either position.”

Question : “ State the amount of force, as near as you can, required to break the scalp or skull ? ”

To this the prisoner's counsel interposed the like objection, and excepted to its allowance.

Answer : “ Any man with a heavy instrument, like an axe or club, could inflict such a wound ; almost any man would be strong enough to do it. A man is capable of exerting a good deal of force with an axe. From the

shape of the bones it would require a good deal of force to do it."

Various testimony was given for the purpose of charging the prisoner with the crime, and, among other facts, it was shown that, during a portion of the winter, he had worked for and lived with the deceased; and some of the evidence indicated that the prisoner, more than any other person, had his confidence. One of the witnesses (Robert Creighton) having testified that the prisoner "lived with Thomas Hand about three weeks; there was no other person living there at the time; I do not know whether Hand had any money," was asked—

"What produce did he have that he sold last fall?"

And to this question the prisoner's counsel objected as immaterial, and on its admission excepted.

Answer: "Eight or nine tons of hay I know of, and ten bushels of peas; I cannot tell how much he received for them; I know of his selling wood; there was three cords of dry wood for three dollars a cord, and some little green wood—two or three loads, probably."

And again, on the examination of a nephew of the deceased, the counsel for the people proposed to inquire whether such nephew, who arrived in this country the previous summer, brought from England and paid to the deceased, in gold, twenty-two sovereigns, and to this the counsel for the prisoner objected, on the ground that it related to a matter too remote in point of time; and excepted to its allowance.

The witness answered: "I gave to Thomas Hand a quantity of gold; it was some time from the 6th to the 10th of July; it was in sovereigns; there were twenty-two; I do not know what he kept it in; I delivered it, and he put it in his pocket-book or purse; I do not know what he did with it after that."

In the cross-examination of one of the witnesses for the prosecution (Patrick Kennedy) he testified, that while the prisoner was at work at the deceased's house (about two weeks after Christmas) he heard a conversation between them about work. The prisoner's counsel inquired

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“What was it ?” and on objection, stated that he “offered to prove that Hand declared he had no money.” The testimony was excluded, and exception was noted.

Although other objections and exceptions were made and taken during the trial, the foregoing statement embraces all that are insisted upon as erroneous by the counsel for the plaintiff in error in this court. On the submission of the case to the jury they returned a verdict finding the prisoner “Guilty of the offense whereof he stands charged in the indictment ;” and thereupon the prisoner’s counsel moved an arrest of judgment, on the ground that the indictment was in the common law form of indictment for murder, and not an indictment charging murder in the first degree under our statute ; that the indictment was equally applicable for murder in the first and in the second degree, and a verdict of “guilty as charged,” was not definite and certain as to the degree of murder of which he was found guilty ; that the court could not determine, from the verdict, of what degree of murder the jury found the prisoner guilty, and therefore, for want of certainty, the court could not sentence the prisoner.

The court held otherwise, and proceeded to sentence the prisoner to death—the punishment of murder in the first degree—and exception was taken on behalf of the prisoner.

On writ of error, the judgment of the oyer and terminer was affirmed by the supreme court, in general term, in the fourth district, wherefore the prisoner, by writ of error, brought the record and proceedings into the court of appeals.

Charles G. Myers, for the plaintiff in error.

B. H. Vary, for the people.

WOODRUFF, J.—1. In *Fitzgerrold v. People*, this court, at January term (4 *Abb. Pr. N. S.*, 68) decided that an indictment charging the prisoner in terms nearly identical with those employed in the present case, is a good and sufficient charge of murder in the first degree. That the statute de-

fining murder in the first degree, murder in the second degree, and manslaughter, has not changed the form of pleading so that an indictment for *murder*, good at the common law, is no longer sufficient. That under such an indictment there may be a conviction of murder in the first degree, or in the second degree, or of manslaughter, according to the description of the act given and proved ; and that the statute is not a rule of pleading, but a guide to the conduct of the trial, and to the instructions to be given to the jury ; and therefore that a general verdict of guilty as charged, is a conviction of murder in the first degree, and warrants a sentence of death—its legal penalty (*Conkey v. People*, 5 *Park. Cr.*, 31 ; *Whart.*, § 3048 ; *Harmon v. Commonwealth*, 12 *Serg. & R.*, 69).

2. It was objected on the trial, in the present case, that the indictment is bad, because it charges the prisoner with the killing of Thomas Hand, *alias* Thomas Jackson. There is nothing in the suggestion that this created any duplicity ; the charge in no sense of the word "*alias*" imported the killing of two persons. To give it such an effect would be to construe it as meaning Thomas Hand and Thomas Jackson, which neither its proper Latin signification, nor its English use, would allow. A more plausible suggestion would have been, that it was bad for uncertainty, because it left it doubtful whether the killing of Thomas Hand, or the killing of Thomas Jackson, was charged. But in order to create this doubt it is necessary to read the word as meaning "or" after the word either, and so make the indictment charge the killing of one of two persons—that is to say, with the killing of either Thomas Hand or Thomas Jackson. But this again is not according to its well understood meaning, as a term in the law long used to avoid a variance or misnomer in pleadings. It does not indicate that different persons are intended, but in pleadings—both in civil and criminal actions—that the names mentioned are different descriptions of the same person. Counsel for the plaintiff in error is right in claiming that it was formerly employed in pleading in connection with "*dictus*" and in that connection

the charge would import the killing of Thomas Hand, otherwise called Thomas Jackson. And the argument is in substance a concession, that had the pleader used the full expression, "*alias dictus*," or "otherwise called," the supposed defect would not exist. I apprehend that the use of the single word "*alias*" to express the whole meaning has so long obtained that it is not uncertain what is the true meaning of the charge, and if not, then there is no just ground for the exception.

Unless there is such uncertainty, the objection, even if technically sound, is not of substance, but of mere form, and could in nowise prejudice the prisoner, and therefore neither renders the indictment invalid, nor affects the proceedings (2 *Rev. Stat.*, 728, § 52). The term has become familiar, as equivalent to otherwise called, or otherwise known as, and may be properly so treated, as having by use in pleadings, in English, acquired that import, as a technical term constantly employed in that sense, without its former Latin companion.

On the argument of the case in this court, the counsel for the plaintiff in error has enlarged the objection taken below, and now, after verdict, insists that even if "*alias*" may be held to import the full meaning, "otherwise called," still the conviction should be reversed, because the *alias* should follow the true name, and that the indictment here should have charged the killing of Thomas Jackson *alias* Thomas Hand, and not the killing of Hand *alias* Thomas Jackson. No such point appears to have been taken below, and no point so purely technical, so void of intrinsic merit, should be permitted to be first raised here, when no possible prejudice could happen to the prisoner by reason of the error, if it were an error. It is by no means clear that if the fact assumed were true, the objection would have any force. Where one had executed an instrument by a wrong surname, it was long since held that he might be sued by such wrong name, "*alias dictus*" his true name (3 *Salk.*, 238); and it was in the days of very rigid adherence to technicality when it was so held. In respect to Christian names the rule was

otherwise, both in civil and criminal proceedings (3 *Salk.*, 238 ; 1 *Ld. Raym.*, 562). On the other hand, *Reid v. Lord* (4 *Johns.*, 118), is to the effect that the true name is that which precedes the "*alias dictus*," and does not notice the distinction above stated. But there is another sufficient answer to the objection. It is not found that the true name of the deceased was not Thomas Hand. On the contrary, the verdict finds the prisoner guilty as charged, and if the pleading on its face imports—as the prisoner's counsel now claims it does—that Thomas Hand was the true name of the deceased, and Thomas Jackson a name by reputation only, then the jury have found the prisoner guilty of the murder of Thomas Hand, who by reputation had the name of Thomas Jackson.

If we are called upon to look at the evidence, and say whether such a verdict should be sustained, we cannot say that it should be set aside as against evidence, or that the testimony shows conclusively that Thomas Hand was a fictitious name. During his residence in this country he was known, and only known, as Thomas Hand. He appears to have been in this country twenty-two years. His nephew, who came in this country the summer previous to the murder, testified : "I am a nephew of Thomas Hand, deceased ; I was *not much acquainted* with him in England ; I recollect him ; that was all ; his name there was Thomas Jackson." No other evidence was given to show that the deceased bore the name of Thomas Jackson. The name of his father or mother, brother or sister, or other relative (save the nephew's name), was not proved. All lies in the recollection of one who was not much acquainted with him, whose memory is taxed to go back twenty-two years, and who barely remembers him. On this evidence we cannot say whether the name by which he was thus faintly recollected may not have been assumed. Doubtless the name by which he was known (if the newhew's recollection is correct) in the land of his birth, would seem most likely to be the true name ; but we could not disturb a verdict upon such a ground and upon such evidence. Besides, the question does not arise as it did

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in the cases above cited. Those were cases in which the defendant was himself declared against, or indicted, with an *alias*. Even there, appearance and plea to the merits waived the error, if any, and after verdict the objection would not avail. Here, if the true name of the deceased were Thomas Jackson, and the name by reputation Thomas Hand, a description of the deceased as Thomas Hand, *alias* Thomas Jackson, would not be such a misdescription as to be fatal after verdict.

If, therefore, no error was committed in receiving or rejecting testimony, there is no ground for reversing the judgment.

3. It was not erroneous to reject testimony to the declaration of the deceased, that he had no money.

The question whether the deceased had or had not money in his possession at the time of his death was, no doubt, a material one, as will presently be considered; and it may have been material to show that the prisoner was aware that the deceased had money; but the declaration that the deceased, some weeks before the murder, was not competent evidence that he had no money; it was no more evidence as against the people, or for the prisoner, than his declaration upon any other subject would have been.

I know of no rule which makes the declarations of the deceased, forming no part of the *res gestæ*, competent evidence, either for or against either party. It is no analogy to dying declarations, which are received, when made in view of approaching death, as having a sanction equivalent to testimony given under the solemnity of an oath before the court and jury.

4. Nor was it erroneous to allow proof of sales of produce made by the deceased in the previous fall, or that his nephew had paid to him sovereigns in the previous July.

Proof tending to show that the deceased had money suggests a motive for committing a robbery, and so a motive to take the life of the deceased, if that would facilitate the theft, or contribute to its concealment. Such a fact

formed a prominent circumstance, tending to the conviction of the prisoner, in *Gordon v. People* (33 *N. Y.*, 501), and was not suggested as of doubtful admissibility in that case. And this court, in *Hendrickson v. People* (10 *N. Y.* [6 *Seld.*], 13), went much further in sustaining the admission of evidence tending, as was claimed, to show a motive for the commission of the crime charged, by receiving testimony which, at most, only showed that the prisoner had a diminished interest in the continuance of his wife's life. It is always a just argument on behalf of one accused, that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends, in some degree, to render the act so far probable as to weaken presumptions of innocence, and corroborate evidence of guilt.

Whether the time of the possession of money by the deceased be or be not too remote to render the evidence proper, must depend very much upon the circumstances of each case. The prosecutor here had given some evidence that, about six weeks before the murder, the deceased had gold, which he desired to sell. The evidence on this point, which was objected to, was that, in the previous July, his nephew had paid him gold. This testimony rendered it probable that it was the gold then received which he had retained and proposed to sell. It did not appear that he in fact sold it, but if it had, it would have left some presumption that he had in his possession the proceeds; and proof of his sales of produce had a similar tendency. All this evidence was slight in its bearing on the guilt of the prisoner, but in its nature it was competent, and it was for the jury to consider and determine its weight. Had the deceased been engaged in traffic—buying, selling, and dealing with others frequently—it might not be proper to go back six months for proof that he received money, unless it was followed by other evidence showing its retention. But here the deceased led a solitary life—mingled very little with his fellow-men. If the testimony did not amount to proof of a miserly habit, it certainly indicated a habit of living so free from

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expense that the jury might well infer that any considerable amount of money in his possession during the fall, or held by him six weeks before his death, was for the most part in his possession when he was killed.

In connection with the other testimony—that the prisoner proposed, at about the time of the murder, to purchase land in the neighborhood—such proof was in its nature competent, and might properly be submitted to the jury as evidence, though slight, that the prisoner, having the opportunity, had also a motive to the crime. It must be conceded that such evidence should be weighed with extreme caution. It is entirely consistent with the perfect innocence of the accused. Of itself it could by no means warrant a conviction. The prisoner, it appeared, alleged that he had money in Canada with which to make the purchase he talked of; and that may be entirely true. The temptation furnished by the proof in this case would seem wholly inadequate to the commission of the crime. But that, to the upright mind, is true of any pecuniary or other motive of mere gain that can be suggested. Unfortunately, in the history of mankind such motives to crime are sometimes influential, and proof of their existence must be left to the jury to be weighed, whether apparently greater or less, in connection with the other circumstances disclosed by the testimony, and in view of the condition, circumstances, habits, and character of the party on whom such motives are alleged to operate.

5. The admission of the testimony of the coroner, who was a physician, as to his opinion respecting the position of the deceased when the blows were given which caused the fatal wounds, is far more questionable. He had described the wounds; he had given their position upon the head, their direction, their length, width, and depth. He had been permitted to give, as far as he was able, the shape of the instrument with which the blows were inflicted, and to state that “striking the scalp from above and backward, would make such a gash—in a vertical or slanting direction: a blow with a blunt instrument.” If any other *fact* was wanting which could guide the judg-

ment in determining the manner of the killing, and which medical or surgical skill could supply, it was competent to inquire further of the witness. Indeed, one of the questions which became the subject of exception here insisted upon, was, I think, clearly competent in that view—viz: as to the amount of force requisite to break the skull. He had not only the skill and knowledge resulting from his professional familiarity with anatomy, and the structure, thickness, and strength of the human skull generally, but he had the particular knowledge acquired by the examination of the skull of the deceased. That he was competent to speak as an expert of the power of resistance of the skull, and so of the force requisite to break it, as it was in this case broken, seems to be quite clear. But here, I think, was an end of the inquiries permissible to draw from him mere opinions.

Having stated all this, he was no more competent to give an opinion as to the position of the body when struck than any other person. One blow was received by the deceased on the left side of the back of the head. How is it possible that a surgeon can tell better than one who is not a surgeon, how the head must be placed so that such a blow can be given? It is entirely obvious that it must be in such a position that it is accessible. In one position it would be easy to reach it; in another it would be difficult; and in yet another it might be impossible. I am not aware that surgeons are experts in the manner of giving blows of this description, or in determining how the head must be placed so as most conveniently to receive them. The form, nature, extent, depth, length, width, and direction of the wound being given, and its precise location on the head, with a general statement of the amount of force requisite to cause it, and the probable shape of the instrument, the jury can judge as well as any one in what position the head or the body probably was when the blow was given. At best, it seems to me, there can be nothing more than a conjecture among several suppositions; but surgical skill has little to do with the inquiry.

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Still less was the position of the body, when the blow was given which caused the wound on the top of the head, the proper subject for an opinion by the surgeon. Obviously a blow may be given on the top of the head whenever the top of the head is within reach of such a blow from the assailant; it may be when sitting; it may be when lying down. A short man standing might receive such a blow from one who is very tall. When all the facts are stated, it must necessarily be nothing but conjecture. And the answer of the witness in this case shows that he could only venture to state that the deceased was *probably* lying down. He was no more competent to infer such probability than the jury were. It is only when the matter inquired of lies within the range of the peculiar skill and experience of the witness, and is one of which the ordinary knowledge and experience of mankind does not enable them to see what inferences should be drawn from the facts, that the witness may supply opinions as their guide. But on what ground it can be said that it requires the peculiar science or professional skill which physicians and surgeons possess, to determine the position in which a man may be struck on the top of his head, I am not able to perceive.

I think, therefore, that the ruling which permitted the answer to those two questions was erroneous. If the position of the body when the blows were struck was material, it should have been left to the jury to infer that position from the facts which tended to show it (*People v. Rector*, 19 *Wend.*, 569; *People v. Bodine*, 1 *Den.*, 281; *Wilson v. People*, 4 *Park. Cr.*, 619; *Jefferson Ins. Co. v. Cotheal*, 7 *Wend.*, 72).

But under the circumstances of this case, this error is of no importance, and furnishes no ground for reversing the judgment. The only possible bearing of the questions and answers lastly adverted to was on the inquiry, whether a murder had been committed. Whether the position of the body, when those blows were given, was erect, reclining, or prostrate, might in some very slight degree bear on the question whether the deceased was in-

jured by an accidental fall, or died by violence inflicted by his own hand ; but when once it is assumed that he died by murder, these inquiries become wholly incompetent and immaterial. They have not the slightest bearing on the question *who* committed the crime. Standing, sitting, or lying down, the deceased was murdered, and, in whichever position, it is alike wholly uncertain *who* struck the fatal blow. Other circumstances might point to the prisoner, but these no more point to him than to any other human being of strength sufficient to give the blow. It is therefore conclusive, as to the materiality of the errors referred to, that it appears by the case that the fact of a willful and deliberate murder was not finally a subject of contest before the jury.

In the beginning of the trial the counsel for the people gave the evidence referred to. He was then in the opening of the case, establishing the primary fact that a murder had been committed.

At the close of the testimony, as we are informed by the judge, in his charge to the jury, no embarrassing disturbances in reference to the nature of the crime were to be considered, and he says :

“The murder that has been committed here is willful and deliberate, *as is conceded on all hands*. The defendant’s counsel *concedes* that the murder, by whomever committed, is willful and deliberate, and such is the charge in the indictment. . . . This disposes of many questions, which are often found important and difficult questions for jurors to pass upon ; and this leaves you with *only* the duty to say whether the defendant, who has been indicted, is the guilty person who has committed willful and deliberate murder. . . . The simple question for you to consider is, whether or not this defendant is the man who committed this murder.”

To all this there was no exception. It is entirely manifest (as was indeed expressly stated by the judge) that the fact of willful and deliberate murder was conceded. How then could the opinion of the coroner, that the fatal blows were received by the deceased in one position rather

than another, affect the prisoner? He wished no question submitted to the jury on which those opinions could have any possible bearing.

If I could see that such opinions could in the slightest degree, or by any possibility, have had any influence on the question who struck the blows, the prisoner should not be suffered to bear that influence or its consequences. I am not able to perceive that it could have any such bearing, or to find any ground for saying that the error is not wholly unimportant. For these reasons, I think the judgment below should be affirmed, and the record remitted, that the judgment may be carried into due execution.

GROVER, J.—It was decided at the last January term of this court (*Fitzgerrold v. People*, 4 *Abb. Pr. N. S.*, 68) that a general verdict of guilty, rendered upon a common law indictment for the crime of murder, authorized a judgment against the defendant for the crime of murder in the first degree, under the statute of the State. This disposes of the principal question relied upon for the reversal of the judgment in the present case.

The more material questions arising upon other exceptions taken during the trial will be considered. It is manifestly immaterial, when a person is known by two names, and the pleader, for greater certainty, deems it necessary to aver such fact in his pleading, which of the two names is first stated, and also, in such case, which was the real name, and which was afterwards acquired. It is sufficient if the pleading designates the names by which the person intended may be known with certainty, irrespective of the priority of the statement.

It is insisted that the usual *alias* cannot be used in an indictment, for the reason that it is not English, and also, if this be not so, that the word does not, with sufficient certainty, convey the idea that the party was also known by the name thereafter expressed.

As to the first point, it may be remarked, that the word has been incorporated into the English language, and as such will not only be found in the principal diction-

aries, defined with precision, but is also in use by writers, and in conversation, as an English word having the meaning given by lexicographers. That meaning is, where it appears between the names of a person, that the person is known by both names. That is a sufficiently certain averment of such fact in an indictment.

The opinion of the surgeon as to how the body of deceased was got into the position in which it was found, and as to the position of the deceased when the blows upon the head were inflicted, was incompetent.

The witness testified that it was mere opinion, unaided by his knowledge or skill as a surgeon. He was therefore no more competent to give an opinion upon these questions than any other person.

Were these questions, or either of them, in any possible view, material upon the trial, the exceptions to the evidence would have been well taken. I can see no possible materiality in either. The evidence precluded every possible idea of suicide, and also every idea that the blows were inflicted in self-defense.

It being an unquestioned case of murder, by whomsoever the blows were inflicted, it was wholly immaterial how the murderer got the body into the cellar, and placed it in the position as found after death, or whether the deceased was sitting, in a stooping posture, or in any other position, when the blows were given.

The evidence having no tendency to prejudice the defendant, the exception was not well taken. The evidence of the quantity of produce sold by the deceased, the fall previous to the murder, was competent. The prosecution had the right to show that the motive of the murderer was the hope of gain. This evidence had a tendency to show that the motive of the murderer was the hope of gain.

This evidence also had a tendency to show that the deceased had money or other valuable property in his house where he lived alone.

The same remark is applicable to the testimony of his nephew, that he brought gold from England, and delivered it to the deceased. The time that had elapsed after

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such receipt of gold by the deceased was for the consideration of the jury.

It was not so long that the court could determine that it had no tendency to show that deceased, at the time of the murder, had money or other valuable property in his possession.

The declarations of the deceased as to the money in his possession were properly excluded. There was nothing to obviate the objection that they were mere hearsay. The opinion of the witness who conversed with the prisoner while in jail, that he was innocent, was properly excluded. This requires no examination.

The circumstances under which he had the conversation with the defendant, proved by the district-attorney, could not have any effect upon the point in question.

I have examined the remaining exceptions, and none of them are well taken.

The judgment appealed from must be affirmed.

All the judges concurred in affirming, except MASON, J., not voting.

Judgment affirmed.

Reversed
33 Abbot. 292
2 Sand. 211
162. See 6 Abb. 167.

BURKE *against* VALENTINE.

Supreme Court, First District; General Term, Nov., 1868.

TENANCY BY THE CURTESY.—MARRIED WOMAN'S ACTS.—
CONSTRUCTION OF WILL.—TRUST.—SUSPENSION OF POWER OF ALIENATION.

The estate of tenancy by the curtesy still exists in this State, notwithstanding the statutes of 1848 and 1849, known as the Married Woman's Acts. Those statutes have not interfered with the right of the husband to the personal estate, or the estate by curtesy, in the real property of the wife,

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after her death, if not disposed of by her, either during life, or by will to take effect at her death.

A direction in a will that all the residue of the estate shall remain in the hands of the executors, or under their control, for the use of the testator's wife and children, while under age, and that after the youngest child shall have arrived at age, the same shall be divided among the children,—does not give the executors an estate in trust.

Where it is apparent from the whole frame of the will that the testator did not contemplate any of his children dying before coming of age, but limited the distribution of the estate upon the majority of the youngest child, the bequest may be regarded dependent on the life or minority of that child alone, and is not void as suspending the power of alienation beyond the period of two lives.

Appeal from a judgment in partition.

John Valentine died, December 14, 1853, seized of certain real estate ; and left a will which contained the following clause, after providing for the payment of certain debts and specific legacies : “Further it is my will, and I do order, that all my estate that may be left after paying the above expenses and legacies, when called for, shall remain in the hands of my executors, or under their control, and for the use of my wife and children, while under age ; and after my youngest child shall have arrived at the age of twenty-one years, my will is, and I do order, that all my property that remains when the youngest child becomes of age, shall be divided among my children, male and female, share and share alike, excepting the right of my wife, Eliza Valentine, hereinbefore mentioned.”

At the time of his death, the testator left him surviving a widow and twelve children, six of whom were minors, and one of whom had married the appellant Burke, and died, after issue born alive, and before her father, intestate, and without having made any disposition of her interest in the premises. The testator's youngest child, Caroline H. Valentine, attained her majority in November, 1865.

This action was brought by the appellant Burke, claiming as tenant by curtesy of his wife's share of the testator's real estate ; and by the appellants, Mrs. Brown

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and her husband, as heir-at-law of the testator. The defendants were, the widow of the testator, and the rest of the heirs-at-law and their respective husbands and wives. The greater part of the rents and profits of the real estate was received by the widow until January, 1866. They were collected by three of the defendants, sons of the testator, one of whom was, by order of court, appointed receiver of the estate. Letters of administration were duly taken out by the appellant Burke on the estate of his wife.

The object of the suit was to set aside the provisions of the will referred to, and also to obtain a partition of, and to compel the defendants to account for rents by them collected from, the real estate in question. The several answers substantially admitted the facts, but denied the conclusions of law.

The cause was tried at special term, before Justice DANIELS, October 12, 1866, who dismissed the complaint as to the appellant Burke, holding that the devise was valid, and that no estate in possession vested in his wife, and while allowing the partition asked, denied the prayer for an accounting. Exceptions to the findings were duly taken by the plaintiffs, who now appealed from the judgment.

George R. Schiefflin and *Elbridge T. Gerry*, for the appellant Burke.—I. The intention of the testator evidently was, that his estate should not be divided, while any of his children were minors. (1.) He expressly declares, that it should remain in the hands of his executors for the use of his wife and *children while under age*. Of the latter there were six at the time of his death. (2.) He directed a division after the youngest child came of age. By this expression he did not mean his daughter Caroline who was in fact his youngest child, for he did not use her name. (3.) He simply meant his youngest child attaining the age of twenty-one; so that if Caroline died, the estate would still remain in trust until the next oldest child came of age (*McSorley v. Leary*, 4 *Sandf.*, 414).

II. This clause of the will was void under the Revised

Statutes, for it suspended the power of alienation for more than two lives in being at the creation of the estate (*Brewster v. Striker*, 2 *N. Y.* [2 *Comst.*], 19-34; *Post v. Hover*, 30 *Barb.*, 312; *Vail v. Vail*, 7 *Id.*, 226; *Amory v. Lord*, 9 *N. Y.* [5 *Seld.*], 403; *Tayloe v. Gould*, 10 *Barb.*, 388; *Hawley v. James*, 16 *Wend.*, 61).

III. If, as contended, the devise was void, the real estate descended to the heirs-at-law in fee simple, as tenants in common, subject to the dower. Mrs. Burke, wife of the appellant, was one of these heirs, had issue born alive, and died intestate, and her husband, therefore, has an estate in her share as tenant by the curtesy. (1.) She had seizin in fact, for there was no prior estate to be determined, and if her children had survived, they would have inherited from her (*Jackson v. Johnson*, 5 *Cow.*, 74; *Gray v. Richardson*, 3 *Atk.*, 469; *Chew v. Commissioner*, 5 *Rawle*, 161; *Robertson v. Stevens*, 1 *Ired. Eq.*, 247; *Sterling v. Penlington*, 7 *Viner Abr.*, 150; *Elsworth v. Cooke*, 8 *Paige*, 643; 1 *Greenl. Cruise*, 141, and note). (2.) Tenancy by the curtesy still exists in this State, and the statutes relative to married women have not affected it where no adverse disposition of the real estate is made by the wife, either in her lifetime or by will (*Woodbeck v. Havens*, 42 *Barb.*, 66; *Ryder v. Hulse*, 24 *N. Y.*, 372; *Laws of 1848*, ch. 200; *Laws of 1849*, ch. 375; *Hurd v. Cass*, 9 *Barb.*, 366; *McCosker v. Golden*, 1 *Bradf.*, 64; *Shumway v. Cooper*, 16 *Barb.*, 556; *Smith v. Colvin*, 17 *Id.*, 157; *Clark v. Clark*, 24 *Id.*, 581; *Vallance v. Bausch*, 28 *Id.*, 633; *Laws of 1860*, ch. 90; *Laws of 1862*, ch. 172; *Lansing v. Gulick*, 26 *How. Pr.*, 250; *Jaycox v. Collins*, *Id.*, 496; *Ransom v. Nichols*, 22 *N. Y.*, 110). (3.) The court erred in refusing to compel the defendants to account for the moneys collected by them out of the estate.

C. A. *Rapallo*, for the appellants Brown.

W. W. *Niles* and S. H. *Thayer*, for the respondents.—

I. Tenancy by the curtesy no longer exists in this State (*Colvin v. Currier*, 22 *Barb.*, 371; *Blood v. Humphrey*, 17

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Id., 660 ; *Sleight v. Read*, 18 *Id.*, 159 ; *Billings v. Baker*, 28 *Id.*, 343 ; *Benedict v. Seymour*, 11 *How. Pr.*, 176 ; *Knapp v. Smith*, 27 *N. Y.*, 277).

II. The clause of the will objected to suspends only the division of the estate ; no trust is created by it (*Double-day v. Newton*, 27 *Barb.*, 431). It is during the minority of only one individual, who is distinctly designated (*Butler v. Butler*, 3 *Barb. Ch.*, 304).

III. The appellants Brown are not entitled to any accounting, because the receiver must himself account before the referee upon the partition.

BY THE COURT.*—INGRAHAM, P. J.—Two questions are submitted on this appeal.

1. Is the estate of tenancy by curtesy abolished as to subsequently-acquired property of a married woman, by the acts of 1848 and 1849 ?

2. If not, was there such an estate vested in the wife of the plaintiff Burke, as to entitle him to an estate by curtesy after her death ?

The property was devised by will in 1853, and, consequently, the title of the plaintiff's wife, whatever it was, was subject to the operation of those statutes. The acts of 1848 and 1849 were intended to protect a married woman in the free use, enjoyment and disposal of her estate for her sole separate use, and provided that such property should not be subject to the disposal of her husband, nor be liable for his debts.

Neither of these statutes in words relate to the property or the right of any one in the property of the wife after her death, in cases where she has not conveyed the same during coverture, or devised the same to others after her death. In such cases it is very clear the husband could have no estate by the curtesy, because it would interfere with the right conferred upon her of conveying or devising the same or any interest therein. If thus, this estate of tenant by the curtesy is taken away, it is because

* Present, INGRAHAM, P. J., and MULLIN and J. F. BARNARD, JJ.

it is inconsistent with the provisions of these statutes and the intent of the legislature in passing them.

The first case on this subject is that of *Hurd v. Cass*, (9 *Barb.*, 366), at special term before Justice MASON, where he holds that the statutes of 1848 and 1849 have not taken away the husband's right to the property after her death, if she has not by deed or will disposed of it. The reasoning in that case is founded on the proposition that those statutes have not and were not intended to alter the law of descent, or for any other purpose than to protect the property of the wife during coverture, and to empower her to convey by deed or devise. In *Blood v. Humphreys* (17 *Barb.*, 660), MASON, J., held that the intent of these statutes was to place married women, as far as the lands which they held were concerned, on the same basis as unmarried females. In *Shumway v. Cooper* (16 *Barb.*, 556), it was held that these acts did not interfere with the rights of the husband after the death of the wife, if she omitted to exercise her right of disposal, and therefore left the general statute regulating the marital rights of the husband, in case of intestacy of the wife, in force. In *Clark v. Clark* (24 *Barb.*, 581), Judge MARVIN concurred with the case in 9 *Barb.*, 366, and held that the statute under consideration did not deprive the husband of his rights as they existed previously, after the death of the wife intestate. If the legislature had intended to deprive the husband of these rights, it should have so declared expressly in the act. *Lansing v. Gulick* (26 *How. Pr.*, 250), adopts the same conclusion, and holds that the right of tenancy by the curtesy still exists, notwithstanding the acts of 1848 and 1849, subject to be defeated by the wife by any disposition of the property in her lifetime by deed or will. In *Jaycox v. Collins* (26 *How. Pr.*, 497), the supreme court at general term in the 7th district held that the estate of a tenant by the curtesy had survived the acts of 1848 and 1849. So in *Vallance v. Bausch* (28 *Barb.*, 633), the general term in this district held that the right of succession to the personalty of the wife undisposed of by her at her death, remained in

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the husband. It was added in that case, "I think the legislature intended to take away neither" the right of succession to the personalty nor his estate as tenant by the curtesy in her undisposed-of realty.

In opposition to these cases, are *Colvin v. Currier* (22 *Barb.*, 371), and *Billings v. Baker* (28 *Id.*, 343). In the first case Justice SMITH says: "These acts repeal the common law giving the husband a right to the personal estate of the wife and a freehold interest in her inheritance, and subjecting the same to the payment of his debts." In regard to this case it is proper to say the point was not necessarily involved, and this, therefore, is not to be regarded as authority. It is also in conflict with the case of *Jaycox v. Collins* in the same district, where the question was material to the decision of the case.

With this conflict of decision in the supreme court we must yield to the weight of authority, which is clearly in favor of the construction which holds that the estate of a tenant by curtesy still exists, notwithstanding the passage of the married woman's acts.

We are not, however, without an expression of opinion on this question from the court of appeals. In *Ransom v. Nichols* (22 *N. Y.*, 110), the court holds that the husband has the right to recover and enjoy as his own, personal property of a married woman after her death, which she has not disposed of. BACON, J., says: "If she fail to make any disposition of the property by way of sale or by testamentary bequest, then the rules, which always prevailed before the statutes of 1848 and 1849 were enacted, take effect, and the husband has all the rights given to him, by the common law and by those provisions of the revised statutes which have never been repealed by the later acts."

The principle decided in this case is applicable to the one under consideration, and warrants the conclusion that the acts of 1848 and 1849 have not interfered with, or taken away the right of the husband to the personal estate, or the estate by curtesy in the real property of

the wife after her death, if not disposed of by her, either during life, or by will to take effect at her death.

The second question is, whether Margaret E. Burke ever had such estate in the lands of the testator, as to vest in her husband an estate as tenant by the curtesy.

The wife of the plaintiff died in October, 1863.

The youngest child came of age in November, 1865. It is apparent from these dates, that unless the will is declared invalid, no estate in possession vested in the plaintiff's wife, at any time prior to her death. She was of age when the testator died, and she died before the youngest child arrived of age. She was one of the devisees in whom was the remainder after the death of the youngest child, but she had no possession, and was entitled to no possession under the will, until the happening of that event. The judge below found that the wife and minor children took a legal estate in the testator's property, during the minority of the youngest child.

The provisions of the will are: "That all my estate that may be left, shall remain in the hands of my executors, or under their control, for the use of my wife and children, while under age, and after my youngest child shall have arrived at the age of twenty-one years, my will is, &c., that the same shall be divided among my children, share and share alike."

It is objected to this provision that it is void, as suspending the power of alienation for more than two lives. This is partly based on the supposition, that the will created a trust in the executors. But I think the executors took no estate in trust.

As executors, they were directed to convert the estate into money, and to hold and manage the proceeds, but the interest and estate was in the wife and minor children. Each child had a share of the property while a minor, and the estate of such child ceased on reaching majority, and the share held by such child thereupon vested in the wife and other children who were minors.

In *Post v. Hover* (30 *Barb.*, 312), on which the plaintiff relies, the provision of the will was that the children

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were not to take the estate until they severally attained the age of twenty-one years ; and the court held such provision suspended the power of alienation for their lives.

The other case of *Savage v. Burnham* (17 *N. Y.*, 561), was of a similar nature. There the will created a trust in the executors, to remain during the life of the widow, and during the minority of six sons, and during the minority of four daughters, or until their marriage. In each of these cases, the alienation was suspended during the lives of more than two persons by express provision in the will. The application of the rule, that when the language is capable of two constructions, one of which would be valid, and the other would make the will illegal, the former should prevail, draws the distinction between the present case and those before referred to, and such a construction is, I think, also consistent with the intent of the testator.

It is evident from the whole frame of the will, that the testator never contemplated the probability of any of his children dying before arriving at the age of twenty-one years ; and he made no provision for the inheriting of grandchildren in case of such death, or any disposition of the share of any child in case of such an event.

He selected his youngest child, and made the estate to widow and minor children, limited on the minority of the youngest child. Under this construction, the limitation would be dependent on the life or minority of that child, and would vest at once in all the children living when either event happened (*Butler v. Butler*, 3 *Barb.*, 304 ; *Dubois v. Ray*, 35 *N. Y.*, 162).

This construction of the limitation is warranted by *Hawley v. James* (16 *Wend.*, 119), where Ch. J. NELSON says : “ ‘Youngest of my children and grandchildren,’ standing alone, might well enough refer to the youngest of each class ;” and the clause in the will in that case was held bad, because it in addition said, “the youngest living and attaining the age of twenty-one years,” by which the intent to apply it to all the children is apparent.

The conclusions to which I have arrived on these points, render it unnecessary to examine the other point made in this case, as to the accounting.

Judgment affirmed.

DUNCAN *against* THE GREAT WESTERN INSURANCE COMPANY.

Court of Appeals ; March Term, 1867.

MARINE INSURANCE.—TIME OF LOSS.—PARTIES.—
CHANGE OF INTEREST AFTER LOSS.

The loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury.

Those who had an interest in the vessel, at the time of such fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to the action.

Appeal from a judgment.

This action was brought by Charles C. Duncan, Theodore and William D. Crooker, Theodore Ripley, and twelve others, to recover upon a marine policy, issued by the defendants on the ship *Adriana*, of Bath, for \$3,000 for one year from April 1, 1856.

The policy was obtained by C. C. Duncan, "on account of whom it might concern, in case of loss to be paid to them." On April 12 the vessel sailed from the port of New York, bound to San Francisco, her first place of destination, with a cargo of coal. She was then in good condition and well manned. On the 16th, and also on the 18th of the same month, she encountered storms and severe gales, with squalls of wind, which strained upon her

seams and wood-ends, producing openings and causing leaks, which injuries resulted in her total loss. By great exertion of the master and crew she was kept afloat until May 5, when she was abandoned in a sinking condition, and immediately went down.

At the time of the inception of the risk, the plaintiffs were all interested in the vessel, part as owners—their interest being subject to mortgage liens—and part as mortgagees; and no change in the ownership occurred until after the vessel received its fatal injury, nor, indeed, until she sank, except that on April 24, three of the plaintiffs, David Crooker, William D. Crooker, and Theodore Ripley, executed and delivered a bill of sale of their interest—being one-fourth part—to Kendall and Richardson, who were not parties to the action.

Proofs of loss and interest were duly presented to the defendants for and in behalf of the owners, but no demand was made by or in behalf of the mortgagees before suit.

On the trial, the defendants admitted their liability for three-fourths of the loss and claim, but defended as to the remaining fourth, solely on the ground that there had been a change of interest as to this fourth, after the inception of the policy, and before the loss occurred.

On the question of fact the jury found specially, that the vessel received a fatal injury prior to April 24—the time of transfer of the one-fourth—which caused her subsequent loss, by sinking, on May 5. The superior court directed judgment against the defendants for the whole claim, holding that in legal construction the loss occurred prior to the transfer of the one-fourth of the vessel, on April 24.

The opinion of the superior court will be found reported under the title of *Crosby v. New York Mutual Ins. Co.* (5 *Bosw.*, 369), a similar case determined by that court at the same time with this.

William M. Evarts, for the defendants, appellants.—
I. There being no proof that the insurance was effected

for the interest of the mortgagees, and no preliminary proofs of their interest having been presented, they are not to be considered in the case. (1.) A policy "for whom it may concern" will be applied only to the interest of the party or parties for whom it was intended by the person who effects or orders it (1 *Phill. Ins.*, 383). (2.) No evidence was offered of any intention on the part of the insurer to include the mortgagees. (3.) If their claims under the policy are recognized in this action, still they have failed to ascertain and prove how much remained due on their mortgage. (4.) The three-fourths insurance, about which there is no dispute, is sufficient to pay all the mortgage debt proved.

II. The insurance was effected for the benefit of the part owners alone, they being the only parties intended, or on whose behalf proofs were presented, or demand made, or who can avail themselves of the defendant's admission of liability for three-quarters. Whether or not the mortgagees have any security from the insurance, is matter of contract between them and their mortgagors. The defendants are under no contract with them.

III. Of the part owners, those only can recover under the policy whose interest in the vessel subsisted at the time of the loss (2 *Am. Lead. Cas.*, 451; *Phill. Ins.*, 185, and cases cited; *Powles v. Innes*, 11 *Mees. & W.*, 10; *Carroll v. Boston Marine Ins. Co.*, 8 *Mass.*, 515). The complaint in express terms claims on behalf of those plaintiffs "who were, at the time of making the policy, and continually afterwards, and until and at the time of the loss, interested," &c.

IV. The plaintiffs, Ripley, W. D. Crooker, and David Crooker, having, by their bills of sale to Kendall and Richardson, parted with their several portions of the quarter in question, can recover nothing on that account unless the vessel was a total loss before the bills of sale were delivered and recorded.

V. The vessel insured had not become a total loss when such change of interest was effected. (1.) The complaint alleges the loss to have taken place on May 6, and

not before. (2.) When the transfer was made, she was still a ship water-borne, pursuing her voyage and transporting her cargo, and as to the one-quarter she was sold as such. (3.) At no time, between the discovery of the leak and the transfer, was the condition of the ship such as to justify an abandonment to the underwriters. For prior to the storm of May 1 she could be kept free from water.

VI. If it were true that she was fatally damaged, or received her death blow upon April 16, or at any time before the transfer, still the fact that the quarter was sold and the price received, precludes the possibility of a recovery under the policy by the vendors as for a total loss. They have sustained no loss, and there is therefore nothing for which they can be indemnified. (1.) Having received their own price for the property as acknowledged in the bills of sale, they are now struggling to make the insurers pay them for it again. (2.) The purchasers of the quarter in question might have insured that portion, and would have been entitled to recover for a total loss. There cannot be two parties with an insurable interest as owners of the same subject, and so entitled to double indemnity for its loss. (3.) The fallacy consists in confounding the fatal damage to the structure of the ship with actual loss to its owners of their property in it.

VII.—There was no evidence that a storm encountered by the *Adriana*, prior to the 24th of April, produced a fatal injury which caused her subsequent loss by sinking on the fifth or sixth of May following. (1.) No leak was discovered prior to the morning of the 19th of April, and up to that time the ship had encountered no unusual perils which could have caused the leak. (2.) After the discovery of the leak, and before the storm of May 1, the ship met with no disaster, bad weather, or extraordinary peril, and was all the while kept free from water. (3.) During this whole interval she was daily within reach of assistance, but her officers spoke no vessel, and sought for no assistance until after the storm of the first of May. (4.) The proximate cause of the loss, the real *death blow*, was the gale of May 1, which continued till May 3; this first made

the leak dangerous. It was followed by the bursting of the pump on the 4th of May, and not till then did the vessel become unmanageable.

VIII.—If the vessel became a total loss before the transfer of the quarter in dispute, the price received by the owners of that portion, as ascertained by the bills of sale, was in the nature of salvage, and went as such by abandonment to the underwriters, and this amount should have been accounted for to the defendants, and their proportion deducted from the verdict (*Phill. Ins.*, § 1714; *Knight v. Faith*, 15 Q. B., 649).

Dexter A. Hawkins, for the plaintiffs, respondents.—I. The change of interest, granting it to be after the inception of the risk and before loss, does not, even as to that one-quarter, terminate the policy; but the same remains in full force for the benefit of the parties purchasing this one-quarter. (1.) There is nothing in the policy prohibiting a change of interest, or even requiring any notice of change, in case one takes place. On the contrary, the policy, in its terms, evidently contemplates a change of interest, and requires no notice of it. (2.) The defendants, by their own act in giving a policy for the “*benefit of whom it may concern*,” agree in the contract that it is of no consequence who the owners may be. (3.) When the company intend to make the parties of the essence of the contract, they require their names to be stated in the policy. (4.) As a further protection they make the loss payable to a party named, who, in receiving the money, acts as agent and trustee for all the parties in interest. (5.) The history of marine insurance and the distinction between it and fire insurance support this view. (6.) In this country the few decisions on this point, at first view against plaintiffs, may be disposed of under two heads. (a.) Fire policies: where the contract is with parties named and them only, and is to be judged with the strictness and severity of the common law inapplicable to marine insurance. The leading case in England (*Lynch v. Dalzell*, 4 Br. Parl. Cases, 431), is put upon the ground that fire policies are

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so framed as to be in terms, contracts only between the assurers and the parties owning the property at the date of the policy. (b.) Marine policies, like those in Massachusetts, that contain a clause prohibiting change of interest without consent in writing, first obtained of the insurance company. (7.) This clause deprives of authority all the Massachusetts decisions adverse to plaintiffs, on this point, since New York policies do not contain any such clause. In *Lazarus v. Commonwealth Ins. Co.* (19 *Pick.*, 81 ; S. C., 5 *Pick.*, 76),—which is a type of these decisions, the policy contained the following :—“ It is also agreed, that this policy shall be void in case of its being assigned, transferred or pledged without the previous consent, in writing, of the assurers.” (8.) In that case there was a New York policy for \$11,000, like the one now before the court, without this restrictive clause, and it was paid in full. Because of this clause in Massachusetts policies, the only course left for the assured, was to show that the transfer was either conditional (not absolute) or after loss. As in *Carroll v. Boston Marine Ins. Co.* (8 *Mass.*, 515) ; *Gordon v. Mass. Fire & Marine Ins. Co.* (2 *Pick.*, 258). (9.) But even under this clause, a transfer of the property, without consent of the insurers, to trustees, does not terminate the policy. (10.) A marine policy is assignable in equity to the assignee to whom the subject-matter or interest thereby insured is assigned, provided the policy contains no provision to the contrary (*Gourdon v. Ins. Co. of N. America*, 3 *Yeates*, 327 ; 1 *Phill. Ins.*, § 77, and cases there cited). A verbal assignment, with delivery of the policy, gives to the assigned an equitable right to the proceeds where the policy contains no provision to the contrary (1 *Phill. Ins.*, § 80 ; Lord ABINGER and B. PARKE, in 11 *Mees. & W.*, 10 ; *Wells v. Archer*, 10 *S. & R.*, 412). (11.) The mere delivery of the policy, without any other act of assignment, for the purpose of security, gives to the depositary a lien on the proceeds of the policy for the purpose (1 *Phillips Ins.*), § 98. (12.) Under an insurance on “ goods,” the cargo may be changed several successive times on the same voyage, and be still covered by the in-

surance taken out at the commencement of the voyage (1 *Arnould*, 211, § 98; *Emerigon*, 1 vol. ed. of 1827, p. 296; 3 *Boulay Paty Droit de Com.*, p. 384; *Hill v. Patten*, 8 *East*, 377). (12.) The averment of interest relates to the date of the policy, and the action is properly brought in the name of the parties in interest at that time (*Perchard v. Whitmore*, 2 *Bos. & Pul.*, 155). If the plaintiff had an insurable interest at the time the policy was effected, whatever change of interest may have taken place since, can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom the property has passed (*Sparkes v. Marshall*, 3 *Scott*, 172; 2 *Bing. N. C.*, 774). (14.) The plaintiffs in this suit held the whole interest at the date of the policy; all still hold interest, but on April 24, 1856, three of them, not knowing that the ship was then a wreck, transferred parts of her as a ship, amounting to one-quarter, to Kendall & Richardson, who are not parties to the suit. No objection has been raised by either demurrer or answer as to any defect of parties; hence, if there was, or is any, it is waived (*Code*, §§ 144, 147, 148). (15.) The policies were never in the hands of the parties who transferred the one-quarter, but were held by the parties to whom they were made payable in trust for every party in interest. If the loss occurred after Kendall & Richardson bought a quarter, then for this quarter, K. & R. are the parties to whom the payees must account in distributing the fund. If the thing sold was a wreck, not a ship, then K. & R., notwithstanding their bills of sale, have nothing to do with it.

II. Granting that the change of interest in the one-quarter on April 24, 1866, did, as to the owner's interest conveyed on that day, terminate *pro tanto* the policy, it would still cover the mortgagees' lien upon this one-quarter secured by the mortgage. For as to this, the interest remains the same as at date of policy (1 *Arn.*, 219, 252; *Irving v. Richardson*, 1 *M. & Rob.*, 153; *B. & Ad.*, 293; *Rogers v. Traders' Ins. Co.*, 6 *Paige*, 583; *Brown v. Bement*, 8 *Johns.*, 96; *Ackley v. Finch*, 7 *Cow.*, 290; *Jones v.*

Smith, 2 *Vesey, Jr.*, 378; Langdon v. Bued, 9 *Wend.*, 80; Furguson v. Lee, *Id.*, 258; Case v. Boughton, 11 *Id.*, 106; 2 *Duer on Ins.*, 49, § 27; Russel v. Union Ins. Co., 4 *Dall.*, 424; Glover v. Black, 3 *Burr.*, 1394, MANSFIELD, J.; Wolff v. Horncastle, 1 *Bos. & Pull.*, 316; BULLER, J.; 6 *Paige*, 587.

III. The plaintiffs are entitled to recover the full amount of the policy, even granting that a change of interest terminates *pro tanto* the policy; for a total loss had accrued before the change of interest, and the liability of the defendant to these plaintiffs for a total loss had attached; of this total loss and liability, plaintiffs gave defendants notice as soon as they heard of the loss. The parties to the transfer of the 24th, acted under a mistake of facts. One thought he was selling a ship when he had none to sell, and the other thought he was buying one when there existed only a sinking wreck in mid-ocean to be bought. It was for any beneficial purpose as completely out of existence as though it had sunk. It was of no more value than a house burned to the ground. Equity would release the purchaser (*Belknap v. Sealey*, 14 *N. Y.*, [4 *Kern.*], 143; 2 *Duer*, 570). The ship may be totally lost within the meaning of a contract of insurance, and yet at the same moment exist sufficiently to be transferred as a ship; for the two contracts proceed upon different principles. A loss for beneficial purposes is a loss within a contract of insurance (*Barr v. Gibson*, 3 *Mees. & W.*, 390; 2 *Duer on Ins.*, 5, 6). Constructive total losses are sustained upon this doctrine. (14.) Had the policy expired by its own limitation on the morning of the 24th April, 1856, the defendants would have been held to pay for a total loss. The rule is: "The claim for loss must be determined according to the injury sustained within the period of the policy, and the *consequent condition* of the subject at the conclusion of that period (*Furneaux v. Bradly*, *Marshall on Ins.*, 584; 1 *Phill. on Ins.*, 706; *Coit v. Smith*, 3 *Johns. Cas.*, 16; *Howell v. Protection Ins. Co.*, 7 *Ohio*, 284; *Stagg v. United States Ins. Co.*, 3 *Johns. Cas.*, 34; *Roux v. Salvador*, 3 *Bing. N. C.*, 286; 2 *Arn.*, 1000, 2004; *Mellish v. Andrews*, 15 *East*, 15).

By THE COURT.—BOCKES, J.—(After stating the facts.) Accepting the facts to be as proved and found—that the vessel had received a fatal injury prior to the 24th April; that after such injury she was a mere wreck, kept afloat by the utmost exertion of the master and crew, unable to proceed on her voyage, or indeed to make headway toward any port, save under the most favorable circumstances of wind and tide—and the judgment of the court below was obviously right.

As the case comes before us, we must regard these facts as definitely and conclusively established. Immediately after the injury was apparent, the vessel was directed toward the nearest accessible port; and although changes were afterwards made in the direction, they were deemed necessary by reason of the shifting of the wind and the extremely hazardous condition of the ship; and notwithstanding the exercise of the utmost prudence, and after exhausting efforts from all on board, she sank at sea. The loss should, therefore, be deemed effectual and certain from the time the vessel was so injured and crippled as that her destruction became inevitable; and in this case the claim for damage must be deemed to have attached when the injury was received which ultimately, and before she could be brought to port, caused the destruction of the vessel (3 *Johns. Cas.*, 16; 7 *Ohio*, 284; *Phill. on Ins.*, 685–86; *Arn. on Ins.*, 1000–1004). The sale of the one-fourth on the 24th April to Kendall and Richardson, the vessel then being a mere wreck, on the supposition and understanding of the parties that she was seaworthy, was of no force as a contract of sale. If the consideration was unpaid, it could not be recovered; or, if paid, could be recovered back.

In my opinion the superior court ruled correctly in holding that the defendants were liable for the full amount of the insurance; and the judgment appealed from should be affirmed with costs.

Judgment affirmed.

FOWLER *against* RIGNEY.*New York Common Pleas ; Special Term, 1867.*

COMPLAINT.—CONTRACT TO PURCHASE AT SELLER'S OPTION.—NOTICE AND DEMAND BEFORE SUIT.

A stipulation to deliver "between" certain days excludes the last day named. Under a contract to purchase merchandise to be delivered at the seller's option, "between" the date of the contract, and a specified day, four days' notice of delivery to be given,—the last day for the delivery is the day before the specified day fixed by the contract.

In order to sustain an action for refusal to receive the merchandise, the seller must give the four days' notice, on or before the fifth day before the day specified in the contract.

Demurrer to complaint.

This action was brought by Frederick R. Fowler, William C. Fowler, and Mahlon B. Crampton, against Thomas Rigney and Henry J. Creighton, who composed the firm of Thomas Rigney & Co.

The complaint alleged that the defendants, through a broker, one McManns, bought fifty tons of oil cake by the following agreement, which was signed by the broker, and also by the defendants:—

"New York, September 15, '64.

"I have this day purchased, of Messrs. F. R. and W. C. Fowler and Crampton, for Messrs. Thomas Rigney and Co., fifty tons oil cake in bags (2,000 lbs. to the ton), *deliverable between this date and October 15, seller's option*, barring accidents to mill and strikes of workmen, at 92 $\frac{5}{8}$ dollars per ton, delivered free on board buyer's vessel. If foreign seed, sellers to have benefit of drawback. Buyer to furnish landing certificates, *four days' notice of delivery to be given.*"

It was also alleged that on the 12th day of October, 1864, and also on the 15th day of October, 1864, the plaintiffs were ready, and on each of those days notified the defendants that they were ready to deliver the oil cake, and requested the defendants to specify the vessel on board which they should deliver it. That the defendants, on each occasion, declined to receive it, alleging that plaintiffs had not fulfilled the contract as to the time of notice.

They then alleged that, after giving notice to the defendants that they should do so, they sold the oil cake; and asked judgment for the deficiency.

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Eliab F. Hall, in support of the demurrer.

Thomas Nelson, opposed.

DALY, F. J.—The complaint sets forth that the plaintiffs agreed to sell, and the defendants to buy, fifty tons of oil cake, deliverable between the the 15th of September and the 15th of October, 1864, seller's option, to be delivered free on board buyer's vessel; buyers to furnish landing certificates, and four days' notice of delivery to be given. That on the 12th of October, 1864, the plaintiffs notified the defendants that they were ready to deliver, and requested the defendants to specify the vessel on board which the delivery was to be made. That the defendants declined to receive the oil cake, alleging that the plaintiffs had not fulfilled the contract as to the time of the notice of the delivery required by it. That the plaintiffs renewed their offer and request on the 15th of October, but the defendants again refused, assigning the same reason.

The defendants demur to the complaint, and the point raised by the demurrer is, whether the notice given by the plaintiffs on the 12th of October, of their intention and readiness to deliver, was sufficient under the contract.

I think it was not. The delivery was to be between the 15th of September and the 15th of October; that is, it was to be before the 15th of October, and four days' notice of it was to be given. The last day for the delivery was the 14th of October, and four days' notice of an intention to deliver on that day should have been on the 10th. It was given on the 12th, and that was not a notice to deliver on the 14th, but on the 15th. It was too short, and the defendants, not having been notified in the manner provided by contract, of an intention to deliver on or before the 14th, were discharged from any further liability upon it (*Atkyns v. Boylston Ins. Co.*, 5 *Metc.*, 439; *Bunce v. Reed*, 16 *Barb.*, 347; 2 *Pars. on Cont.*, 177, note).

The plaintiffs insist that the true construction of the contract is this: That they had the whole of the time between the 15th of September and 15th October to elect or not to deliver, and that if they notified the defendants at any time before the 14th, of their intention to deliver, they were to notify them at the same time that the delivery would be made four days thereafter; or, to make it more plain, that they could notify the defendants on the 14th that they would deliver on the 18th. But I do not so read the contract. It expressly provides that the oil cake "is deliverable between this date (15th of September, the date of the contract), and October 15th, seller's option," and "four days' notice [is] to be given." The plain import of this language is that if the plaintiffs elect to deliver they must deliver within that period, and give four days' previous notice of the time, that the defendants may have their vessel ready and be prepared at the time with landing certificates.

The demurrer is well taken, and the defendants are entitled to judgment.

BRUCE *against* DAVENPORT.*Court of Appeals, June Term, 1867.*

DISAFFIRMANCE OF CONTRACT.—DELAY AFTER DISCOVERY OF FRAUD.—NEW TRIAL.—EVIDENCE.

One who proposes to disaffirm a contract on the ground of fraud, which induced him to enter into it, must do so at once, upon the discovery of the fraud.

The defendants, who were partners, employed the plaintiffs, as brokers, to sell a note which defendants held, at a discount, without their indorsement and without recourse; but by making false statements to one of the partners, and by concealing the instructions given by the other partner, plaintiffs obtained the indorsement of the firm name on the note,—*Held*, that if the representation to one partner of what his associate would do if present, be deemed sufficient ground, within the rule respecting fraud, to avoid the contract, the defendants could not take advantage of it after having received and retained the proceeds of the note, and been silent for nearly three months, until the insolvency of the maker occurred. They should, at once, when the real facts were made known to all of them, have tendered the plaintiffs the money received, and demanded a return of the note.

On reversing a judgment for error, and ordering a new trial, the court are not authorized to make it a condition that testimony already taken may be read in evidence upon the new trial. The new trial being a matter of right, the party is entitled to it without qualification.

Appeal from an order for a new trial.

This action was brought by John M. Bruce, William A. Odell, and David M. Farnum, against James S. Davenport, Samuel W. Davenport, and Thomas Davenport. The plaintiffs sought to recover against the defendants as indorsers of a promissory note for \$2,350.62, made by a firm doing business under the name of Beale, Mellick & Dewitt. The defense relied upon was that the note in question was, previous to its maturity, delivered by Thomas Davenport, one of the defendants, respon-

dents, to the plaintiffs, appellants, to be sold, as it was, by the latter, who were note-brokers, and that the appellants afterward procured the note to be indorsed in the firm name of "Davenport Bros.," while Thomas Davenport was absent, by James S. Davenport, another of the respondents, who was ignorant of the instructions alleged to have been given to the appellants by Thomas Davenport at the time he delivered the note to them, and that such indorsement was procured by an alleged false representation of William A. Odell, one of the appellants, to the effect that Thomas Davenport would indorse the note were he at home, and that he usually did indorse notes of that kind left with the appellants for sale.

The referee found as facts that within a few days after the delivery as aforesaid of the note in question to the plaintiffs, Odell, one of the plaintiffs, called at the defendants' place of business. Thomas Davenport was then absent.

Odell found the defendant, James S. Davenport, there, and requested him to indorse this note in the name of the defendants' firm.

J. S. Davenport at first declined doing so, saying that Thomas Davenport attended to this part of the business, and that he knew nothing about it.

Odell then stated to him that Thomas Davenport was in the habit of indorsing the name of his firm on the paper of those makers ; that he invariably did so ; that he would indorse this note if he were at home, and that if J. S. Davenport indorsed it he would find it all right when Thomas Davenport returned ; that the plaintiffs could sell the note if the defendants indorsed it, but not otherwise. The defendant, J. S. Davenport, induced by these statements of Odell, then indorsed the note in the name of the firm.

In a day or two after J. S. Davenport thus indorsed the note, Thomas Davenport returned, and on being informed by J. S. Davenport of the representations and of the indorsement, expressed his dissatisfaction, and said he would not have indorsed it for five hundred dollars ;

and J. S. Davenport expressed indignation at having been induced to indorse the notes by the statements, as above mentioned, of Odell.

The defendants did not express dissatisfaction to the plaintiffs as to the indorsement, or the means by which it was obtained, till it was ascertained that the makers were insolvent.

The referee reported in favor of the plaintiffs for the balance due on the note, after deducting a payment made by the assignee of the maker, holding that the statements made by Odell were not such false representations as would invalidate the contract of indorsement, in that they were promissory; in that the statements contained no warrant of the condition or ability of the makers of the note; in that the statement was not one that a person of ordinary prudence should have relied upon; and in that the representations, in a legal sense, caused no damage to the defendants, as they are in no worse position than if they had not sold the note, but had retained it till maturity.

The supreme court at general term in the first district reversed the judgment of the referee, and ordered a new trial.

The decision of the supreme court, which was now reversed, is reported in 36 *Barb.*, 349.

The order for a new trial directed that the testimony taken on the former trial be read in evidence on the new trial.

The plaintiffs appealed to the court of appeals, stipulating that, if the order appealed from should be affirmed, judgment absolute might be entered against them.

James C. Carter, for the plaintiffs, appellants.—I. The facts found by the referee are not sufficient to avoid the contract of indorsement, either upon the ground of fraud or mistake. (1.) To entitle a party to relief on the ground of mistake or false representations, the statements made must be so as to a material fact, and of such a nature that the party could not, by reasonable diligence, get knowl-

edge of it (1 *Story Eq.*, §§ 146, 147, 193, and 195). (2.) The mistake or misrepresentations must be of a material fact calculated to mislead persons of ordinary prudence and caution. (3.) The party must sustain damage (2 *Kent Com.*, 637, 639). The facts in this case do not bring the appellants within these well-settled rules.

II. The statement made by Odell has caused no damage to the defendants. If the note had not been sold, it would have been worthless in their hands. It is fair to presume that the note could not have been sold without their indorsement. The defendants lost nothing by their indorsement. They received the money on account of the note (1 *Story Eq.*, §§ 146, 147, 193, 195; 2 *Kent Com.*, 637, 639; 1 *Pars. on Cont.*, 267; *Camp v. Pulver*, 5 *Barb.*, 91).

III. The decision of the referee rests upon authorities showing the principle that no contract can be avoided on the ground of fraud or mistake, unless the false representations made under the mistake were of a character to mislead persons of ordinary caution and prudence, or unless the party has suffered damage by such representations. If a party shuts his eyes to the representations made, when, by opening them, he might detect their falsity, he shall not be relieved from his obligation to fulfill his contract.

William W. Niles, for the defendants, respondents.—

I. We never made any contract of indorsement with them, or asked them to take up the note after protest. They took it not only with constructive, but actual notice; as to them the indorsement was procured by fraud, and, being our agents from the beginning, they cannot enforce against us any contract procured by their fraud; and we place much stress upon the relation of principal and agent existing between the parties. An agent's first duty is to obey the instructions of his principal (*Johnson v. New York Central R. R. Co.*, 33 *N. Y.*, 610).

II. It does not matter whether the statements of Odell are "false representations" or not; it is a mistake of the referee that no fraud less than a felony will vitiate a

contract. If the fraud of an agent avoids a contract as to his principal, should it not as to himself? (*Bennett v. Judson*, 21 *N. Y.*, 238). The statement of an agent without the knowledge of his principal, that a certain fact existed, which does not, though the agent supposed he was stating it correctly, will render the contract void for fraud, if the agent did not know the true state of the case, as will, also, his simple silence (*Hill v. Gray*, 1 *Stark.*, 352; *Waldron v. Stevens*, 12 *Wend.*, 100; *Elwell v. Chamberlain*, 2 *Bosw.*, 230). These things, however, do not constitute felony. This precise question has been settled in this State, where the court held that it "is error" to charge that plaintiffs were bound to make out a case of "false pretenses." The contrary is plain enough as to executory contracts not under seal, and the party can even recover back the consideration of a sealed instrument (*Cary v. Hotailing*, 1 *Hill*, 311).

III. That portion of the falsehood relating to what Thomas Davenport would do, "was not promissory." It was stated as a fact which plaintiff claimed to know from his previous agreement or understanding in this case. Where A. procured a deed from B. by representing that C. was about to foreclose a mortgage, though the case is not within the statute, it will not be pretended that a delivery of the deed would be decreed under an agreement so procured (*People v. Williams*, 4 *Hill*, 9; *Mead v. Bunn*, 32 *N. Y.*, 275). The statement that Thomas Davenport invariably indorsed this paper, is a material fact, and not a mere allegation that Thomas Davenport, from some peculiar "inducements" had indorsed this paper. It was, in substance, that Thomas Davenport regarded the makers as good—that he did not hesitate to indorse their paper without inducement—that the agreement for the sale of this note was conditioned upon its indorsement by the defendants—and that, in fact, it was a mere oversight on the part of Thomas Davenport in failing to indorse it, &c. A "material fact" is a fact calculated to influence the defendant's action (3 *Phill. on Ev.*, 393); and the statements of the plaintiff

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were such as a person of ordinary prudence should have credited.

IV. The presumption of the referee as to the books is in direct opposition to the evidence ; but whether it was so or not is wholly immaterial. The law permits a vendor, without a penalty upon his credulity, to trust to declarations of the material facts within the knowledge of the other party (*Whitney v. Allaire*, 1 *N. Y.* [1 *Comst.*], 309 ; *Mead v. Bunn*, 32 *N. Y.*, 275). So where a person purchased real estate on the assertion that there was no mortgage on it, though the mortgagee, at the same moment, told him there was one (*Haight v. Hayt*, 19 *N. Y.*, 564 ; *Elwell v. Chamberlain*, 2 *Bosw.*, 230).

V. The assumption of the referee that the defendants were not "damnified," is wholly unsupported. The fact is, though not in proof, that the defendants were not bound to account for the note to Van Syckle until they had sold it, and if they were not, they were damnified.

HUNT, J.—We are not at liberty to deny the finding of the referee, that the defendants' indorsement of the note in suit was obtained by the false representation of Odell.

The representations were false, but they are not found to be fraudulent. Whether this question of fraud was one of fact which should be found by the referee, or whether it would be held to be a question of law under *Bennett v. Judson* (21 *N. Y.*, 238), is not, in my view of the case, a material question. Assuming that the transaction was fraudulent, and that the representations were such as might well have deceived a prudent man ; assuming, also, that a representation to one partner of what his associate would do, if present, comes within the rule on this subject (as to which see 1 *Story Eq. Jur.*, § 199), there is a further difficulty, which cannot be overcome.

This arises from the failure of the defendants promptly to repudiate the indorsement, when informed of the means by which it was obtained. The absent partner returned to his place of business within a few days after the in-

dorsement was obtained, and was informed of the means and representations employed by Mr. Odell to obtain it. Great indignation was expressed by the partners, among themselves, at his conduct.

No disaffirmance, however, of the transaction, no offer to return the money and take back the note, or even a disapproval or complaint of the means employed, was made to the plaintiffs. The defendants, on the contrary, received and retained the proceeds of the note, and were content to remain as they were, for a period of nearly three months. The insolvency of the maker, at that period, occurred, and for the first time the defendants then communicated to the plaintiffs the complaint that their indorsement had been fraudulently obtained.

This will not do. It is the duty of a party who proposes to disaffirm, as fraudulent, a contract entered into by himself, his partner, or agent, to do it at once, upon the discovery of the fraud.

He must be ready and prompt in such disaffirmance. It will not do to keep the money in his pocket for three months, to deprive the other party of the opportunity of protecting himself, to await the chances of a successful performance of the fraudulent contract, and only to repudiate when the danger of loss becomes imminent.

Neither honesty, good faith, nor the principles of law, will justify such a course.

If the defendants deemed themselves injured by the representations of Mr. Odell, it was their duty, upon the return of the absent partner, when the real facts were made known to all of them, at once to have tendered to the plaintiff, the money received from them, and to have demanded a return of the note.

For illustrations of these principles, see *Minturn v. Main*, 7 *N. Y.* [3 *Seld.*], 220, 227, *Saratoga & Schenectady R. R. v. Row*, 24 *Wend.*, 74; *Lloyd v. Brewster*, 4 *Paige*, 537; *Conner v. Henderson*, 15 *Mass.*, 319; *Cutler Gilbreth*, 53 *Me.*, 176.

Upon this ground, I think, the judgment of the ref-

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eree should be affirmed, and that of the general term reversed.

That portion of the order directing that the testimony already taken, might be read in evidence on the new trial was unauthorized and irregular. The new trial, as awarded by the general term, was his right. He was entitled to it, without condition or qualification.

A direction that evidence of a certain character should be admitted was not a legal condition.

All the judges concurred.

Order for new trial reversed.

CHRISTY *against* LIBBY.

New York Common Pleas ; General Term, January, 1869.

ACTION FOR ACCOUNTING.—PLEADING.

An action lies by an administrator against one who had been appointed collector of the estate of the plaintiff's intestate, to compel him to account for the assets.

In the complaint in such action it is not necessary to aver an accounting had before the surrogate ; for the jurisdiction of courts of equity is concurrent. Nor is necessary to aver the residence of the intestate, in order to establish the jurisdiction of the surrogate.

The New York court of common pleas have the same powers as those exercised by the late court of chancery in such cases.

If the defendant relies upon the pendency of proceedings on an accounting pending at the commencement of the action, it should be set up by answer.

Form of a complaint held sufficient.

Appeal from an order overruling a demurrer.

This action was brought by Harriet E. Christy, administratrix of the estate of Edwin P. Christy, deceased, against

James S. Libby, individually and as collector of the estate of said Edwin, to compel the defendant to account to the plaintiff for the assets he had received as such collector, and that he be ordered to deliver up and pay over the property and moneys of the estate, and the value of property lost through his mismanagement. The allegations of the complaint were in the following form:—

The complaint of the plaintiff, as administratrix of the estate of Edwin P. Christy, deceased, shows to this court:

First.—That on or about the 21st day of May, 1862, the said Edwin P. Christy died intestate, and that on the 22nd day of May, 1862, letters of administration upon the estate of said Edwin P. Christy, were duly issued and granted by the surrogate of the county of New York, of this State, appointing this plaintiff administratrix of all the goods, chattels and credits which were of said deceased, and that thereupon this plaintiff duly qualified as such administratrix, and entered upon the discharge of the duties of her said office.

Second.—That afterwards, a contest arose before said surrogate as to the right of the plaintiff to be such administratrix, and, during the pending of such contest, and on the day of , the defendant, James S. Libby, was duly appointed collector of the estate of said Edwin P. Christy, deceased, by the surrogate of said county of New York, and the said defendant thereupon duly qualified according to law, and entered upon the duties of said office, and as such collector, took possession of his goods, chattels, moneys and effects, set forth in the schedule annexed to this complaint, and which forms part thereof.

Third.—That said appointment of said defendant was only to continue until it was determined who was entitled to administer upon the estate of said Edwin P. Christy, deceased; and that afterwards, on or about day of December, 1866, said contest was finally decided and determined in favor of this plaintiff; and that on or about the 12th day of January, 1867, a final decree was duly entered in the office of the clerk of the city and county of

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New York, and in the said office of the surrogate of the county of New York, reversing, annulling, and setting aside a former decree of the said surrogate, denying the plaintiff's right to said letters of administration aforesaid, and affirming and confirming the plaintiff's right to administer upon the estate of said Edwin P. Christy, deceased, and to the full and complete control and possession of all the personal property of which he, the said Edwin P. Christy, died possessed.

Fourth.—That this plaintiff has, during the month of October, 1867, and prior to the commencement of this action, demanded of said defendant that the property, money, and effects of which he became possessed, as such collector, be delivered to her, and that he account therefor to her, as such administratrix, and the said defendant refused, and still refuses so to do.

Fifth.—This plaintiff alleges, on information and belief, that a large amount of said property and effects have been converted into money, and that said defendant fraudulently retains possession thereof, and all of said property, and the proceeds thereof; that he has, by fraud, neglect, and mismanagement, lost a large amount of the personal property and effects of which he became possessed as such collector; and by and through his omission and neglect, lost a large amount of other personal property and effects, to which he was entitled as such collector; and that the value of all the said personal property and effects is many thousands of dollars; and to all which, or the value thereof, this plaintiff, as such administratrix, is now entitled.

Wherefore this plaintiff demands judgment against the defendant, that he account to this plaintiff for all the personal property and effects, moneys which have come into his possession and to which he was entitled as such collector, that he be ordered and directed to deliver to this plaintiff, as such administratrix, all the personal property and effects still remaining in his possession; that he pay to this plaintiff, as such administratrix, all moneys in his possession, and to which he was entitled as such collector; that he pay to

the plaintiff, as such administratrix, the value of all personal property and effects which have been lost through his mismanagement or neglect ; and that the plaintiff have such other and further judgment against the defendant to which she may be entitled, and that the defendant pay the costs of this action.

To this complaint the defendant interposed a demurrer assigning the following as the grounds thereof.

First.—That it appears upon the face of the complaint that this court has no jurisdiction of the subject of this action.

It appears on the face of the complaint that the defendant was appointed collector of the estate of the deceased by the surrogate of the county of New York, and that the surrogate's court of the said county is the proper forum in which to adjust the accounts, and control the proceedings of its officers, and the persons deriving their authority from that court.

Second.—That several causes of action have been improperly united ; one being an action for an accounting as collector and special administrator, and the other an action for alleged negligence or mismanagement in conducting a trust, whereby the plaintiff seeks to recover the value of personal property and effects, alleged to have been lost through the defendant's mismanagement.

Third.—That the complaint does not state facts sufficient to constitute a cause of action.

At special term in December Mr. Justice VAN VORST heard the demurrer, and gave judgment for the plaintiff with leave to answer. His decision, which is now affirmed by the court at general term, is reported in 35 *How. Pr.*, 119.

The defendant appealed therefrom.

Amos G. Hull, for the appellant.—For reasons which will appear obvious to the court, and to save the time of the court, I propose to state my points in the inverse order stated in the demurrer.

I. The complaint does not state a cause of action. It

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nowhere appears on the face of the complaint, that the testator ever resided in the county of New York. The fact should appear, in order to give the surrogate jurisdiction. The residence of the intestate is a material and traversable fact. It is a jurisdictional fact, and should be stated in such a form as to tender an issue to the adverse party. The complaint should contain a particular statement of the time and place of the appointment of the administratrix, and the residence of the intestate and the functionary by whom the letters of administration were granted, to the end that the court may determine whether the representative suing as such has any status in court, and whether the surrogate appointing such representative had any jurisdiction (*Beach v. King*, 17 *Wend.*, 197; 4 *Den.*, 80; *White v. Joy*, 13 *N. Y.* [3 *Kern.*], 83; *Sheldon v. Hoy*, 11 *How.*, 11). In the case of *Forrest v. Mayor, &c.*, the complaint stated, as in this case, that the administrator had been duly appointed, but Judge LEONARD held the complaint was defective. The defendant has a right to try the issue, whether the intestate ever resided in the county of New York, to the end that he may never be compelled to answer to any other administratrix (*Vide* 13 *Abb. Pr.*, 350; *Vide* *Hill v. Stocking*, 6 *Hill*, 314, opinion of BRONSON, J.; *Gould Pl.*, 8; 1 *Chitty Pl.*, 287; *Stephen's Pl.*, 288; *Myers v. Machado*, 6 *Abb. Pr.*, 198). The defendant has a right to show on the trial that the intestate did not die in the county of New York, and that the surrogate of this county acquired no jurisdiction on his estate. That is a traversable fact, and must be alleged in order to sustain the complaint (*Safford v. Drew*, 3 *Duer*, 627). The surrogate's court being a court of limited and statutory jurisdiction, a court of common law jurisdiction, when matters and proceedings before the surrogate are under review, can take nothing by implication. This court can take no judicial notice of proceedings before surrogates' courts as such, and the pleadings alleging such proceedings must set forth the jurisdictional facts, to the end that the adverse party may have an opportunity to traverse the jurisdiction (*Sibley v. Waffle*, 16 *N. Y.*,

180 ; People v. Barnes, 12 *Wend.*, 492 ; People v. Koeber, 7 *Hill*, 39). It is not enough to allege in general terms that the plaintiff was duly appointed administratrix of the estate of Edwin P. Christy, deceased, by the surrogate of the county of New York, but the facts which form the basis of the jurisdiction, conferring the right to make such appointment, must be stated (*Cleveland v. Rogers*, 6 *Wend.*, 438 ; *Sackett v. Andross*, 5 *Hill*, 327 ; *Van Etten v. Hurst*, 6 *Id.*, 311 ; *People v. Koeber*, 7 *Id.*, 39 ; *Whitney v. Shufeldt*, 1 *Den.*, 592).

II. It nowhere appears upon the face of the complaint, that the removed or superseded special administrator (the defendant) has been cited to account before the surrogate. It is provided by 2 *Rev. Stat.*, 95, § 68 (2 *Rev. Stat.*, 98, *Edmonds' Ed.*), that whenever the authority of an executor or administrator shall cease or be revoked, or he be superseded for any reason, he may be cited to account before a surrogate at the instance of the person succeeding to the administration of the same estate in like manner as thereinbefore provided for a creditor. Section 69 enables the removed administrator (or collector) to settle his account voluntarily by citing the new administrator and others interested, and such settlement is to have the like effect as a settlement at the instance of a creditor. What decree is the surrogate to make? Sections 68 and 69 give the new administrator, in enforcing this account, the character of a creditor. He is entitled to the balance for the purpose of administration. Sections 18 and 19, 2 *Rev. Stat.*, 116 (120 *Edmonds' Ed.*), provide the nature of the decree to which the creditor is entitled. The surrogate has power to decree in favor of a creditor the payment of a demand. Then, after obtaining his decree for a balance, what is his remedy? Section 19 provides an ample one. The surrogate may order the collector's bond to be sued. The question whether the decree of the surrogate has been obeyed will then be the only question to be tried. The plaintiff in this case has lost sight of the necessity of procuring his decree for such balance (*Vide* *People v. Corlies*, 1 *Sandf.*, 228, reasoning of VANDERPOEL, J., at p.

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245). This being the only remedy pointed out by statute, for an incoming administrator to call his removed predecessor to account, all other remedies are superseded on the maxim "*Inclusio unius est exclusio ulterius.*"

III. Several causes of action have been improperly united. The plaintiff prosecutes for an accounting, which is a matter always arising on contract. Secondly, for fraud and neglect of duty. A plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction (*Dan. Ch. Pr.*, 449, *Latting v. Latting*, 4 *Sandf. Ch.*, 31; 12 *How. Pr.*, 46, opinion of WOODRUFF, J.; *Jackson v. Forrest*, 2 *Barb. Ch.*, 576, in point; *Story Eq. Pl.*, §§ 274, 286, of 6th ed.; *Hunter v. Powell*, 15 *How. Pr.*, 221, in point).

IV. Conceding, for the sake of the argument, that this court has concurrent jurisdiction with surrogate courts in the matter of calling executors and administrators to account, still it is respectfully submitted, that this court ought not to *entertain* jurisdiction of such cases, unless something appears in the case showing that the surrogate is disqualified from acting. It was manifestly the intention of the legislature to confer such jurisdiction *primarily* on the surrogate, on the grounds of convenience and public policy. There is no fact alleged in this case showing the surrogate to be disqualified, or showing why these accounts should not be settled in the forum primarily intended for the settlement of these accounts. The general jurisdiction of the surrogate in this State is conferred by § 1, title 1, chapter 2 part 3, of the revised statutes (2 *Rev. Stat.*, 220; 229 *Edmonds's ed.*). By subdivision 3, of that section, jurisdiction is expressly conferred upon him "To direct and control the conduct and settle the accounts of executors and administrators" (*Seaman v. Duryea*, 11 *N. Y.* [1 *Kern.*], 324). "It was the intention of the legislature, in conferring this jurisdiction on surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of executors and administrators, and to *supersede* the necessity of a

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resort to the court of chancery for that purpose." The jurisdiction was extended by the act of 1850 to trustees under a will (*Laws* of 1850, ch. 587 ; *Vide Will. on Ex.*, 37). The tendency of legislation in this State, for the last fifty years, has been to enlarge the jurisdiction of the surrogates' courts. The doctrine of the court of appeals in the case cited (11 *N. Y.* [1 *Kern.*], 327) is that the legislature intended to supersede the authority of the other equity courts in these matters of accounting, on grounds of economy, and for the summary and speedy administration of justice. It is submitted that this court may take judicial notice of the several interlocutory orders based on proof which at least two of the judges holding this general term, when sitting at chambers, deemed sufficient, which orders were made upon the theory, based upon proof, that before the suit was commenced the surrogate had acquired jurisdiction of the parties and subject-matter, and was proceeding to the adjustment of the same accounts referred to in the bill of complaint herein. The reference is to the orders staying the plaintiff's proceedings when an attempt was made to examine the defendant as a witness before trial. If it is proper for this court to take cognizance of the proof offered on those motions, then the case is within that in 8 *Paige*, and the court would not feel bound to *entertain* jurisdiction if they have it (*Rogers v. King*, 8 *Paige*, 210).

C. Bainbridge Smith, for the plaintiff, respondent.

BY THE COURT.—DALY, F. J.—The complaint avers the day of the death of the intestate, the granting of letters of administration upon his estate to the plaintiff, the day when they were granted, that they were granted by the surrogate of the city and county of New York and that the plaintiff qualified and entered upon her duties, as administratrix, which is all and even more than was necessary (*Ring v. Roxborough*, 2 *Tyr.*, 468 ; 2 *Will. on Ex.*, 1595, and note 1, 4th Am. Ed. ; 1 *Chitty on Pl.*, 315 ; 2 *Id.*, 109, 110 ; Ch. Am. Ed. ; *Ketchum v. Ketchum*, 4 *Cow.*,

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87; Goldthwayte v. Petrie, 5 *T. R.*, 234). The granting of letters by the surrogate to the plaintiff is *prima facie* evidence of her due appointment, and that he had the requisite evidence before him to authorize his action (Sibley v. Waffle, 16 *N. Y.*, 180, and in the cases before cited.)

It was not necessary to aver an accounting before the surrogate. The provisions of the revised statutes conferring the jurisdiction upon surrogates was to provide an inexpensive and summary mode for bringing executors, &c., to account, but did not take away the power theretofore exercised by courts of equity to afford this species of relief. It still exercises a concurrent, and in some cases, an exclusive jurisdiction (Rogers v. King, 1 *Paige*, 210; *Will. on Eq. Jur.*, 560).

This court has the same power exercised by the court of chancery, and by the supreme court in all actions where the defendant resides or is personally served with process in this city (Bowen v. Irish Presbyterian Congregation, 6 *Bosw.*, 246). If the defendant had been cited to account before the surrogate, and an account was pending before him at the commencement of this suit it should be set up by way of answer; for the defendant cannot be required to account before two tribunals at the same time (Percival v. Hickey, 18 *Johns.* 257; *Gr. Pr.*, 228, and cases there cited), where another action or proceeding for the same cause is pending.

The decision of the court below that the plaintiff was entitled to judgment upon the demurrer was therefore right, and the order appealed from should be affirmed.

Order affirmed.

SOLMS *against* THE RUTGERS FIRE INSURANCE COMPANY.*Court of Appeals ; March Term, 1867.*PARTIES IN ACTION ON INSURANCE POLICY.—MISTAKE.—
INDORSEMENT AS TO PAYMENT OF LOSS.

The mistake of naming one who has no interest, as the insured in a policy of fire insurance, is cured by an indorsement, made by the secretary with notice of such mistake, stipulating that the loss, if any, is to be payable to a mortgagee named.

A recovery may be had in the name of the real party in interest in such a case, for the indorsement may be regarded as a new contract of insurance with him.

Whether the owner of property insured can recover, if the policy was, by mistake, made payable in terms to another person,—*query?*

Appeal from a judgment.

In 1856, Charlotte Quisse owned a house and some furniture, occupied and used by her, in Westchester county, upon which she desired insurance for four thousand dollars. She employed her husband, A. H. Quisse, to obtain such insurance, and gave him fifty dollars to pay the premium. The husband went to New York, and made application to the Stuyvesant Company for the whole amount of insurance, informing the company that it was to be insured for Charlotte Quisse, who owned the property. The company agreed to make the insurance, and received from him the fifty dollars for the premium. The Stuyvesant Company, not wishing to assume the whole risk, applied to the defendants, who agreed to insure twenty-one hundred dollars of the amount.

About a week afterwards, A. H. Quisse, the husband,

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called again, and the Stuyvesant Company gave him two policies upon the property, one for \$2,100, executed by the defendant, and one for \$1,900, executed by itself, both insuring A. H. Quisse, the husband, instead of Charlotte, the wife. A. H. Quisse did not know this, but spoke about there being two policies, when he expected but one; but was assured defendant's company was good, and that it was all right, and he took the policies.

The mistake in the policies remained undiscovered by Charlotte and A. H., until Charlotte was called upon for additional security for the mortgages given by her, when she took both policies to Mr. Thorne, the attorney of the mortgagees, who at once discovered the error, knowing that the title was in Charlotte, and informed her thereof, at which time she employed him to procure them to be corrected, and authorized him to have, in addition, the losses made payable to the respective mortgagees—the policy in question being intended for the benefit of Mary Entwistle. Thorn gave the policies to a clerk to go to the offices and get them arranged in accordance with the wishes of Mrs. Quisse. The clerk proceeded with the policy in question to the defendants' office, and presented the same to defendants' secretary, and informed him that the property in question belonged to Mrs. Quisse, and that she wanted the loss, if any, made payable to Mrs. Mary Entwistle. The secretary indorsed on the policy the loss payable as requested, and returned the policy to the clerk, who received it, supposing it all right. The secretary made no verbal reply to the request of the clerk, and did nothing except as above stated.

The property insured was afterward, and during the term of the policy, destroyed by fire, and Charlotte Quisse and Mary Entwistle each assigned their claim to the plaintiff, who brought this action against the defendant for the recovery of the amount insured.

Upon the trial the only question was whether a recovery could be had, for the reason that the insurance was to A. H. Quisse, the husband, and the title was in Charlotte, the wife. The cause was tried before a jury, and the

judge, upon the plaintiff's proofs, dismissed the complaint upon defendants' motion, to which plaintiff excepted. Judgment was entered in accordance therewith, and after affirmance thereof by the general term of the superior court, the plaintiff appealed to this court. The decision of the superior court, which is now reversed, is reported in 8 *Bosw.*, 578.

Thomas Darlington, for the plaintiff, appellant.—I. Before and without reference to the transaction on November 7, 1856, when defendants' policy was delivered to them for correction, a valid contract of insurance existed between Mrs. Quisse, the owner, and the defendants. (1.) Defendants, by allowing themselves to be offered by the Stuyvesant Company as one of the insurers to fulfill a contract already made, virtually offered to adopt that contract, and by the acceptance of that offer and the receipt of the premium, they actually became parties thereto, and occupied the same position as if they had contracted from the commencement. The time when they came into the contract is not material ; from that time they were bound to the same party that had contracted with the Stuyvesant Company, viz : Mrs. Quisse. (a.) The original application to the Stuyvesant Company to insure Mrs. Quisse as owner of certain property for \$4000, and acceptance and payment of the premiums constituted a valid contract of insurance. The property, interest, amount, and rate were all fixed, and the contract executed on the part of the assured. Had a loss occurred that night, the Stuyvesant Company would have been obliged to pay it. This oral contract was determinable upon the delivery of a policy which should correctly express its terms in writing, and the assured could compel the delivery of such a policy (*Kelly v. Commonwealth Ins. Co.*, 10 *Bosw.*, 82 ; *Angell on Ins.*, §§ 35, 68, and cases cited ; *Whitaker v. Farmers' Ins. Co.*, 29 *Barb.*, 312). (b.) Defendants offered to the assured, through the Stuyvesant Company, to act as *substitutes* for the Stuyvesant Company, to assume part of their contract. (c.) By authorizing the Stuyvesant Compa-

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ny to offer their policy to the party to be insured, in substitution for the Stuyvesant Company, in the contract of insurance already made, the defendants made the Stuyvesant Company their agents for that purpose, and are bound by the acts of the Stuyvesant Company in so doing. (*d.*) Even if any mistake existed (which the appellant denies), *the defendants*, as between themselves and the assured, are estopped from setting up that they were misinformed as to the terms of the insurance they thus offered to assume. They cannot set up a mistake on their part after the owner has accepted and acted upon the faith of the only offer made to her. (2.) The defendants, if any misinformation was received by them, in relation to the insurance they intended to effect, received the same through their own agents, and are bound by communications made to the latter (*McEwen v. Montgomery Co. Ins. Co.*, 5 *Hill*, 101; *Sexton v. Same*, 9 *Barb.*, 191; *Masters v. Madison Co. Ins. Co.*, 11 *Barb.*, 624; *Buntin v. Orient Ins. Co.*, 8 *Bosw.*, 448).

II. The acts of the defendants' secretary, after information that Mrs. Quisse was the owner had been given him, cured any prior misunderstanding between the parties, or any defect in the policy, and rendered the contract between Mrs. Quisse and the defendants perfect.

III. No acquiescence by the assured in a mere misdescription could affect the contract, and there was no such acquiescence in this case. Neither Mr. nor Mrs. Quisse could read the policy; as soon as they discovered the error they sent to have it corrected, and Mr. Thorne and his clerk did not notice, from simple inadvertence, that the correction was not made in writing.

IV. Hence the plaintiff was clearly entitled to relief in this action. If the policy sufficiently expressed the contract between the parties, the action was properly brought upon that instrument. If it did not sufficiently express that contract, the action was maintainable without regard to the policy, or the policy might have been reformed and enforced. (1.) The policy sufficiently expressed the con-

tract. *Falsa demonstratio non nocet* (Greenl. on Ev., §§ 291, 301, and the cases there cited). (2.) If the policy does not so express it, the oral contract is still in existence, and enforceable against them (10 Bosw., 82, before cited). (3.) Or, still regarding the policy as defective, it may be reformed and enforced, because it does not correctly set forth the contract it was intended by both parties to express; and it makes no difference that the mistake was not discovered until after a loss (Bunten v. Orient Ins. Co., 8 Bosw., 448; Carpenter v. Mutual Safety Ins. Co., 4 Sandf. Ch., 408; Lightbody v. N. A. Ins. Co., 23 Wend., 18).

V. Whatever relief plaintiff was entitled to, he should receive in this action. Relief is to be given consistently with the facts stated, although it be not the relief specifically demanded. It is unimportant whether the action was brought specifically to reform and enforce the policy, or to recover for the loss independently of the policy, or to enforce the policy without reformation. The amended complaint states fully the facts of the case, an answer has been interposed, and the court below was bound to grant the plaintiff any relief, legal or equitable, to which the proof of those facts showed him to be entitled (Code, § 275; Emery v. Pease, 20 N. Y., 62; New York Ice Co. v. Northwestern Ins. Co., 23 Id., 357; Marquat v. Marquat, 12 Id. [2 Kern.], 336).

Livingston M. Miller, for the defendants, respondents.—I. The contract of insurance is personal, and no action can be maintained unless the assured had an interest at the time of the insurance (Barker v. The Marine Ins. Co., 2 Mas., 369; Graves v. Boston Marine Ins. Co., 2 Cranch, 419; De Forest v. Fulton Fire Ins. Co., 1 Hall, 84).

II. The policy of insurance cannot be varied, but may be reformed upon due allegation and proof of either fraud or mistake, by which the party really insured was therein designated by a wrong name: in other words, it must be proved that Charlotte Quisse was the person with whom the defendants made their contract, and through the fraud

or mistake of the defendants, they made a policy, which did not set forth their contract. This implies identification of the party, whom they undertook and agreed to insure with Charlotte Quisse. Of this there is no evidence whatever.

III. There is no evidence whatever that the defendants ever agreed to insure Charlotte Quisse, or were requested to insure her, or ever heard of her, before making the policy, or would have been willing to issue the policy to her.

IV. Neither the Stuyvesant Insurance Company nor the plaintiff's witness, Burnett, were the agents of the defendants for any purpose. They were the agents of the plaintiff's assignor.

V. If they were in any sense such agents, they certainly were not agents to insure, and the utmost claimed by the plaintiff is that the Stuyvesant Company and Burnett had notice that Charlotte Quisse wanted to get insurance. It is not pretended that the defendants had any such information.

VI. The indorsement of Nov. 7, 1856, simply made the mortgagee the appointee of the person insured, and did not change the nature of the contract (*Grosvenor v. Atlantic Ins. Co.*, 17 *N. Y.*, 391.)

VII. The plaintiff's assignor, Mary Entwistle, had full information of the nature of the policy, and her rights under it, when she accepted it with the indorsement of Nov. 7, 1856.

GROVER, J.—The plaintiff showed no right to relief upon the ground that there was a mistake in making out the policy originally by the defendant. Although the evidence showed that the application made for insurance upon the property, to the Stuyvesant Company, by A. H. Quisse, was for insurance in behalf of Charlotte Quisse, the owner of the property, yet there was no evidence tending to show that any such application was made by that company to the defendants, nor but that the defendants made the policy in strict accordance with the application and

agreement entered into. It is clear that no recovery could be had upon the policy as made, because A. H. Quisse was the party thereby insured, and he had no interest in the property, either at the time of making the insurance, or at any time thereafter, and consequently had sustained no loss, and therefore had no claim for indemnity.

The ground entitling the plaintiff to relief, if any, was the presentation of the policy to defendants' secretary, by the clerk of Thorne, the clerk at the time informing the secretary that Charlotte Quisse owned the property, and wanted the loss, if any, made payable to Mary Entwistle. The secretary must be presumed to have understood this, as there was no contradictory evidence. The taking the policy, and making an indorsement thereon making the the loss payable as requested, without expressing any dissent to regarding the policy as a valid one in behalf of Charlotte Quisse, the owner, must be regarded as an agreement on his part to make a valid policy to her upon the property. The company had already received the premium for a valid insurance upon the property, to the amount expressed in the policy. It had executed and delivered a policy, supposed to be valid, but which, through mistake, probably of the Stuyvesant Company, was a mere nullity. This transaction with the clerk, unexplained, required the finding of an agreement by the defendant to insure Charlotte Quisse, the owner of the property, in consideration of the premium already received.

Whether the secretary supposed the policy was made to her originally, as the assured, and believed the remark of the clerk, that she owned the property and desired the loss made payable to Mrs. Entwistle, to show that the change in that respect was desired by the assured ; or whether, through inadvertence, the correction was omitted, does not appear, nor is it material. At any rate, the assent of the secretary to an agreement to insure Mrs. Quisse does appear.

It is well settled that an agreement by parol to insure, and to make out a policy, when the terms are all under-

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stood, is binding upon the insurer, and will be enforced in the courts. In this case, I think, this agreement of the secretary was a valid contract, binding upon the company, and that, as the evidence stood at the time of the motion to dismiss the complaint was made, the plaintiff was *prima facie* entitled to recover. The judge, therefore, erred in dismissing the complaint.

The judgment should be reversed, and a new trial ordered.

HUNT, J.—This was an action brought in the superior court of the city of New York, by the plaintiff, as assignee of Mary Entwistle and Charlotte Quisse, to recover for a loss by fire. In April, 1856, Charlotte Quisse, who was the owner of the property insured, sent her husband, A. H. Quisse, to New York, to procure an insurance upon the property, and gave him the money with which to pay the premium. He applied to the Stuyvesant Insurance Company, informed them that the property was his wife's, that she wanted it insured for \$4,000, and that she had sent him with \$50 to get the insurance. The company accepted the risk, and received the money: the policy was to be afterwards delivered. The next day one Burnett, who was an insurance broker both for the Stuyvesant Company and the defendants, and in the employ of both for the purpose of procuring applications and negotiating policies, and who acted for the defendants in this respect in procuring the insurance in question, made a survey of this property, at the request of the Stuyvesant Company. Burnett knew that the property was owned by Mrs. Quisse, and on this occasion was informed that the insurance was desired for her, as both Mr. and Mrs. Quisse testified. Burnett testified that Quisse said he wished the insurance in his own name. Before the policy was issued, Burnett, with the assent of the Stuyvesant Company, informed the defendants of the application, who agreed to take half the risk, and paid Burnett for procuring the insurance. The name of the person insured was written "A. H. Quisse," in both policies. About a week

elapsed before the delivery of the policy. The Quisses were Germans, and ignorant. On the 7th of November the error in the policies was discovered, and a clerk was sent from the office of an attorney to inform the companies of the error, and to procure a memorandum of correction, and that the loss was to be payable to the mortgagee named. In the case of the Stuyvesant Company, the memorandum was correctly made. Upon the policy of the defendants, the memorandum was made in these words: "Nov. 7, '56, loss, if any, payable to Mary Entwistle." The evidence was uncontradicted that the company was at the time informed of the error in the name of the party insured. On the 24th of December the property was destroyed by fire. Afterwards, Charlotte Quisse assigned all her interest in the policy to Mary Entwistle, and the latter assigned to the plaintiff. At the close of the testimony, the defendants moved for a nonsuit, which was granted, and the judgment thereon was affirmed at the general term of the first district. The plaintiff appeals to this court.

I think the judgment is erroneous. Mrs Quisse paid to the defendants her money for an insurance upon her property. The defendants received her money, intending so to insure her, and supposing they had insured her to the amount of \$2,100. If they had any knowledge of the error, and intended to receive or to retain her money, allowing her to suppose that she had a valid insurance, when they understood it to be otherwise, they were guilty of a fraud which will afford them no protection. That the mistake of the name was a mere mistake, and that it was the mistake of the defendants' agent, Burnett, was proven by the testimony of both Mr. and Mrs. Quisse. On a nonsuit, all disputed facts are to be assumed in favor of the plaintiff. This is, therefore, to be assumed as the true state of the case. Burnett knew that the property was that of Mrs. Quisse, and was informed, while examining the same on behalf of the defendants, that the insurance was desired in the name of Mrs. Quisse. The defendants knew, not only what the property was, its nature and

character, but knew who made the application, and who was the party desiring the insurance. The knowledge of their agent was the knowledge of the defendants (*McEwen v. Montg. Co. Ins. Co.*, 5 *Hill*, 101; *Masters v. Mad. Co. Ins. Co.*, 11 *Barb.*, 624; *Bunten v. Orient Ins. Co.*, 8 *Bosw.*, 448; affirmed court of appeals, not reported). I think all these circumstances establish a contract on the part of the defendants with Mrs. Quisse, and that if the property had been destroyed, intermediate the receipt of their portion of the premium by the defendants, and the issuing of their policy, the defendants would have been liable to her for the \$2,100. The evidence of Mr. Quisse, who testifies that he made the application to the company in that form, and of Mr. and Mrs. Quisse, who testify that they so informed the defendants' agent while he was examining the premises, and the retention of the money by the defendants with that knowledge, gave all the essentials of a valid contract of insurance in favor of the party so applying and paying (*Kelly v. The Com. Ins. Co.*, 10 *Bosw.*, 82; *Whitaker v. Farmers' Ins. Co.*, 29 *Barb.*, 312; *Angell on Ins.*, § 35, and cases cited; *Johnson v. Talman*, in court of appeals, not reported).

The transaction which took place when the error was discovered, I think also relieves the case from its difficulty. It is not pretended that there was any error in the character of the risk, the amount of the premium, or, at that time, in the name of the individual to be insured. The defendants were distinctly informed that there was an error in the name of the party insured; that it should be Charlotte Quisse, instead of A. H. Quisse; that the former was the owner of the property; and they were desired to correct it, or to make a suitable memorandum upon the subject. They made a memorandum, consenting to the assignment desired, but containing nothing on the subject of the erroneous name of the person insured, and handed back the policy. It was distinctly proven that they were informed of the error at this time. What was the intention, and what was the legal effect of this return of the policy, with a consent indorsed that the loss

should be paid to Mary Entwistle? The intent could honestly be no other than to redeliver the policy after this information, and to insure anew the property described. If the defendants can be supposed to have reasoned with themselves that "there was an error, we will say nothing about it, we will keep the premium and avoid a liability if a loss should occur," the well-settled principles of law and morality would compel the indemnity to the party claiming. The defendants will be compelled to perform the contract, as they allowed the other party to understand it, and to suppose that they understood it. I doubt not that the intention of the defendants, in returning the policy to Mrs. Quisse's agent, uncorrected, after being advised of the error, was to reissue and redeliver the same, disregarding the error, and such was its legal effect. The act of the defendants was either a trick, unworthy of a respectable company, or it was a statement to Mrs. Quisse that she might regard her policy as valid notwithstanding the error, and that if any loss occurred, it should be paid to Mrs. Entwistle in the same manner as if the correct names were there inserted.

On this point, the argument in the court below was to the effect that these acts were only proof, either that the defendants did not understand that any request was made to them to alter the policy, or if they did so understand it, they refused it, as they had a right to do.

The evidence was distinct that the request was made to the secretary of the company, and there was no pretense, in fact, that it was not understood. If the secretary had so testified, a question would have been presented for the consideration of the jury, and, if they had found with the defendants on that question, it would have ended the point. Neither is it just to say that, if they did understand it, the company refused the request to make the alteration, as they had a right to do. On the contrary, they assumed to grant it, allowed and induced the assured to understand that the matter was entirely satisfactory to them, and never intimated a refusal or dissatisfaction, until called upon to make good the loss. If

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they had refused the correction, the assured could have supplied the want of a new insurance. They did not, however, refuse, and cannot now justify themselves on that ground.

I think a new trial should be ordered.

Judgment reversed, and new trial ordered.

BURNETT *against* PHALON.

Court of Appeals; June Term, 1867.

TRADEMARK.—INJUNCTION.

The rule that a manufacturer, or merchant for whom goods are manufactured, has a right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining, and that this right will be protected by injunction, applies to the use of such a compounded term as "Cocoaine," to designate a hair-wash in which cocoa-nut oil is a principal ingredient. And the subsequent adaption, by a rival dealer, of the word "Cocoïne," to designate a similar compound put up by him, is an infringement against which the courts will interpose by injunction.*

Appeal from a judgment.

This action was brought by Joseph Burnett and William Otis against Edward and Henry A. L. Phalon. The object of the action was to restrain the defendants from manufacturing, using, selling, or in any manner disposing of a compound or preparation with the name "Cocoïne," or "Cocoaine" printed or stamped upon the bottles, labels, wrappers, covers, or packages thereof; also from using the word "Cocoaine" or "Cocoïne" upon any

* Compare *Town v. Stetson*, *post*, p. 218.

wrappers, labels, or trademarks, and also from manufacturing, selling, or offering for sale, any preparation or compound under the name of "Cocoine" or "Cocoaine;" and also from imitating, in any manner, the trademark "Cocoaine;" and that defendants may account to the plaintiffs, and pay over to them the profits of all the said material sold under the simulated name and trademark above set forth.

Upon the trial by the court, without a jury, the following facts were found.

1. That in or about the month of Nov., 1856, the plaintiffs, druggists and apothecaries, compounded from coconut oil, and other ingredients, a mixture used as a hair-wash, for which they devised as their trademark a name, word, device, or title never before used, by which to mark their said compound, to wit, the name or word "Cocoaine," and that they published the same very extensively, with notice that they had adopted said name or title, as their "trademark," to secure the public and the proprietors against imposition, and that all unauthorized use of this trademark would be promptly prosecuted; that the plaintiffs then and thereupon introduced their said compound into the market, and expended a sum exceeding ten thousand dollars in advertising, publishing, and introducing the same.

2. That in or about the month of Nov., 1858, the defendants, Edward Phalon and Henry A. L. Phalon, composing the firm of Phalon & Son, of the city of New York, hair-dressers and perfumers, commenced the preparation and sale of a similar compound, in bottles not unlike those containing the plaintiffs' compound, and with labels under the name and title of "Cocoine," and that they have since manufactured and sold large quantities thereof.

3. That the defendants, well knowing that the name, word, or title, of "Cocoaine" was, and for a considerable time had been the trademark of the plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word,

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or title of "Cocaine" was that of the plaintiffs; and with the wrongful intention of securing to themselves the benefit of the skill, labor, and expense of the plaintiff, had so closely imitated and used the aforesaid trademark of the plaintiffs as to deceive the public and injure and endamage the plaintiffs. That the word, name, title, or device "Cocaine" is a spurious and unlawful imitation by the defendants, of the word, name, title, or device "Cocoa-ine," the aforesaid trademark of the plaintiffs.

4. There was no evidence to support the defendants' allegations that the plaintiffs have in any manner committed any fraud, or imposed upon the public.

5. That the plaintiffs are entitled to the relief demanded in the complaint, that the defendants be perpetually enjoined and restrained from the further imitation and use of the aforesaid trademark of the plaintiffs, and that the damages which the plaintiffs had sustained they were entitled to recover.

Such damages having been ascertained, judgment was rendered accordingly for the plaintiffs; and on an appeal to the general term, the same was affirmed.

The decision of the superior court of New York, which was now affirmed by the court of appeals, is reported in 9 *Bosw.*, 192.

E. W. Dodge, for the defendants, appellants. — I. The injunction rests upon the ground that the plaintiffs had contrived a new word. They allege that they invented and composed the word. Now, in truth, Cocaine is a properly compounded word, and the legitimate name for a preparation of cocoa-nut oil. The plaintiffs invented nothing. He compounded his word Cocaine from two words already in use. The fact that the plaintiffs gave public notice that they had adopted Cocaine as their trademark is of no consequence, for they did not possess such right of appropriation (*Upton on Trademarks*, 179).

II. The word, applied to an article of perfumery, indicates the nature of the compound, so that it cannot be

urged that it is a mere fancy term. The law recognizes no right of property in a word used to indicate the name of an article (The Amoskeag Manufacturing Company v. Spear, 2 *Sandf.*, 599; Fetridge v. Wells, 4 *Abb. Pr.*, 144; S. C., 13 *How. Pr.*, 385; Stokes v. Landgraff, 17 *Barb.*, 608; Williams v. Johnson, 2 *Bosw.*, 1; Wolfe v. Goulard, 18 *How. Pr.*, 64; Corwin v. Daly, 7 *Bosw.*, 222; *Upton's Trademarks*, 187). If the name indicates the owner of the establishment, it may be protected by injunction (See Howard v. Henriques, 3 *Sandf.*, 725; Knott v. Morgan, 2 *Keen*, 213; Stone v. Carlan, 3 *Code Rep.*, 67; Marsh v. Billings, 7 *Cushing*, 322; Genin v. Chadsey, 12 *Abb. Pr.*, 69). The word Cocaine does not in any possible manner indicate either the origin or ownership. It has no meaning, except to indicate the name of the cosmetic within the bottle (See review of Justice PIERREPONT's opinion in this case in *Upton's Trademarks*, 171 *et seq.*).

III. If the court shall be of the opinion that the mere contrivance or invention of a word gives to the inventor an exclusive right to its use as the name of an article of his manufacture, then it is submitted that the defendants should have a new trial upon their newly-discovered evidence.

John Sherwood, for the plaintiffs, respondents.—I. The questions of fact are settled by the court below and will not be reviewed by this court (*North v. Bloss*, 30 *N. Y.*, 374; *Thompson v. Kessel*, 30 *Id.*, 383; *Frost v. Koon*, *Id.*, 428; *Beebe v. Mead*, 33 *Id.*, 589). Leaving out the letter "a" in the word, only made more apparent the intention to defraud the plaintiffs and the public. This was a mere colorable evasion (*Taylor v. Carpenter*, 2 *Sandf.*, 213, and cases). The notice given by the plaintiffs that they had adopted Cocaine as their trademark, is most important in determining the question of the intent of the defendants in wrongfully imitating the trademark. If the plaintiffs have given out the word as their mark, and by this description the article has acquired a reputation and

sale, they are entitled to full protection (*Williams v. Johnson*, 2 *Bosw.*, 1).

II. Although the word indicates the origin of the article, it does not follow that no right of property can be had in it. None of the cases cited apply to the case of a word, by which they indicate the origin of the article so invented and composed, as a new symbol or device for a trademark (*Gout v. Aleploghu*, 6 *Beav.*, 69; *Stokes v. Landgraff*, 17 *Barb.*, 608; *Wolfe v. Goulard*, 18 *How. Pr.*, 64).

III. A new word may be adopted as a trademark; and it is no objection that the letters which the plaintiffs adopt as a symbol of his article form a symbolic word which is new and at the same time conveys an idea of the ingredients.

IV. As to the prior existence of the word "Cocaine:" (1.) It never existed in our language. (2.) It never existed as a substantive, capable of designating a preparation or any other substance. (3.) It never existed as denoting any preparation of cocoa-nut oil, or any hair-wash. (4.) When used by Phalon to denote a preparation of cocoa-nut oil for the hair, it derived that meaning solely and entirely from the fact that Burnett had previously used "Cocoaine," to designate a similar article. This is really the test of its having formerly existed in such a sense as to debar the plaintiffs from the privilege of coining and appropriating this new word.

V. The criticism on this case in *Upton's Trademarks* is unsupported by authority; and the word had by its appropriation a connection with the name of plaintiff, and acquired a distinct and recognized meaning. When an article is called by a new name which is connected with the name of the manufacturer, so as to indicate ownership and origin, it is and ought to be protected.

VI. But the law does not favor those who, by imitations, appropriate to themselves the fruits of the ingenuity, labor and enterprise of others; and the great majority of cases are decided upon the broad ground that there was a palpable attempt to imitate what others had invented

and brought to the notice of the public. The actions of the inventor of the trademark are not the subject of investigation so much as those of the imitator (*Croft v. Day*, 7 *Beav.*, 84; *Howard v. Henriques*, 3 *Sandf.*, 725; *Sykes v. Sykes*, 3 *B. & C.*, 541; *Rogers v. Nowhill*, 5 *Man.*, *Gr. & Scott*, 109; *Morrison v. Salmon*, 2 *Man. & Gr.*, 385; *Day v. Binnings*, 1 *Coop. Ch.*, 489; *Ransome v. Bentall*, 3 *Law J. R. N. S.*, 161; see also cases in *Upton on Trademarks*, 122; *Farina v. Silverlock*, 39 *Eng. Law & Eq.*, 517; Judge DUER, in *Amoskeag Mfg. Co. v. Spear*, 2 *Sandf.*, 599; see also *Clark v. Clark*, 25 *Barb.*, 76; *Brooklyn White Lead Co. v. Masury*, 25 *Barb.*, 416; *Williams v. Johnson*, 2 *Bosw.*, 1; *Coffeen v. Brunton*, 4 *McLean*, 576; *Hine v. Lart*, 10 *Lond. Jur. R.*, 106; *McAndrew v. Burnett*, 10 *Jur. N. S.*, 492; where the use of the word "Anatolia" was protected; *Barrows v. Knight*, 6 *Rhode Island*, 434.

VII. It is undeniable that defendants intended to obtain the benefit of the name to the prejudice of plaintiffs' rights. The objections taken by them are of a technical character, and do not present equitable grounds for disturbing the injunction.

DAVIES, Ch. J.—Upon the facts found by the court, the right of the plaintiffs to the relief granted is clear and indisputable. The plaintiffs have adopted, appropriated and used a certain trademark. This has become their property, and, for its protection from invasion or use by others, the plaintiffs are entitled to invoke the aid of courts of justice.

We have the ascertained facts before us, that the defendants are using a spurious and unlawful imitation of the plaintiff's trademark. This they cannot be permitted to do. The cases in the courts of this State have firmly established this doctrine (*Coats v. Holbrook*, 2 *Sandf. Ch.*, 586, and cases there cited; *Taylor v. Carpenter*, *Id.*, 603; same case in court of errors, *Id.*, 611; *Partridge v. Menck*, *Id.*, 622; *Williams v. Johnson*, 2 *Bosw.*, 1; *Stokes v. Landgraff*, 17 *Barb.*, 608; *Wolfe v. Goulard*, 18

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How. Pr., 64 ; *Clark v. Clark*, 25 *Barb.*, 76 ; *Brooklyn White Lead Co. v. Masury*, *Id.*, 416).

The rule is nowhere laid down with more clearness and accuracy than by Mr. Justice DUER in his elaborate and able opinion in the case of the Amoskeag Manufacturing Company v. Spear, 2 *Sandf.*, 599). He thus says : " Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his, in the market for which he intends them, and that he may thus secure the profits that their superior repute as his may be the means of gaining. His trademark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a court, as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given." Upon the facts proved by the court on the trial of this action—and such finding is conclusive upon this tribunal—the judgment of the superior court of New York was correct, and should be affirmed with costs.

All the judges concurred.

Judgment affirmed.

TOWN *against* STETSON.

New York Common Pleas ; Special Term, Dec., 1868.

INJUNCTION.—TRADEMARK.

A manufacturer cannot acquire a special property in an ordinary term or expression, as his trademark, the use of which as an entirety is essential to the correct and truthful designation of the particular article or compound.

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Thus a dealer in salt fish cannot maintain an exclusive claim to the use of the term "dessicated codfish" as a trademark. It is only by the prefix of some other word, not previously applied in that connection, and not essential to the truthful designation of the article produced, that he can be protected in its exclusive use.

Motion to dissolve an injunction.

This action was brought by Charles M. Town against James A. Stetson and others, for an injunction against an alleged violation of trademark. Both parties were dealers in salt fish, and the plaintiff claimed priority of invention of the article known as dessicated codfish, and of the use of that word on his labels, &c. The defendants denied these claims, and alleged the priority of invention to rest with other parties.

A temporary injunction had been granted, and the cause now came before the court on a motion to dissolve it.

Stewart, Ritch & Woodford, C. A. Seward, and C. M. Keller, for the plaintiffs.

Gilbert & Smedley, for the defendants.

BARRETT, J.—The present is distinguishable from that class of cases of which *Messerole v. Tynberg*, 4 *Abb. Pr. N. S.*, 410, and *Newman v. Alvord*, 40 *Barb.*, 588, are the most recent, as well as the most distinctively advanced in principle, in this, that the popular word "dessicated," here sought to be burdened with a new and exclusive use, is specially descriptive of the article sold; in fact, it is the only word which correctly describes the process whereby this particular preparation of codfish is produced.

No manufacturer can acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound. The courts have gone a long way, and with plain justice, in protecting the honest and enterprising manufacturer of any good and

useful article from the unscrupulous pirating of his special reputation ; but they have been equally careful to prevent any attempted monopoly of that which is common to all (*Corwin v. Daly*, 7 *Bosw.*, 222 ; *Bininger v. Wattles*, 28 *How. Pr.*, 206 ; *Wolfe v. Goulard*, 18 *Id.*, 64 ; *Amoskeag Manufacturing Co. v. Spear*, 2 *Sandf.*, 599 ; *Brooklyn White Lead Co. v. Masury*, 25 *Barb.*, 417 ; *Burgess v. Burgess*, 17 *Eng. L. & Eq.*, 257 ; *Perry v. Puffit*, 6 *Beav.*, 66 ; *Singleton v. Bolton*, 3 *Doug.*, 293 ; *Millington v. Fox*, 3 *Mylne & C.*, 338).

Here each party has as much right to dessicate codfish as he has to dry or preserve fruits, or to pickle or spice oysters and salmon ; and it is a sequence to this right that he may sell the article thus produced, under the designation which is strictly appropriate to the altered or modified condition of the principal ingredient. Indeed, the use of such designation is in my judgment a moral obligation upon the manufacturer, for to dessicate codfish and then sell it as a preparation produced by other means, would be a concealment of fact, and a species of trade charlatanism. The court will certainly neither prevent people from calling things by their right names nor force a misnomer upon them. The plaintiff may distinguish his "dessicated codfish" as the "Bismarck" (see *Messerole v. Tynberg*, *supra*), or the "Von Beust" or by the prefix of any other proper name or common word not previously applied in that connection, and not essential to the truthful designation of the article produced, and he will be protected in its exclusive use. But he can no more acquire a special property in the word "dessicated," as applicable to an article which has undergone that process, than he can to the words "dried," "preserved," or "pickled," as applied to that which has, in fact, been thus treated.

It should be added that no attempt has been made to deceive the public, or to palm off the defendants' dessicated codfish as that of the plaintiff's manufacture. On the contrary, pains seem to have been taken to render the two articles as dissimilar as possible. The one is put up

in boxes, the other in packages ; the labels are of opposite colors and designs, and the types of different sizes, and the reading matter varied ; while for the codfish which engraved upon the plaintiff's label, and which constitutes, as indeed the stamp expressly indicates, his real " trade-mark," the defendants have substituted something which bears a feeble resemblance to a soft-shell crab. No purchaser can mistake the one preparation for the other, and the defendants' intention is perfectly clear. It is, while using the word dessicated, as we have seen is their right, to sell the article produced as codfish of their own, and not of the plaintiff's dessication.

The motion to dissolve the injunction must therefore be granted.

ATKINS *against* LEFEVER.

Supreme Court, Third District ; General Term, May, 1868.

COSTS OF SEPARATE DEFENSES.

Defendants sued on the same instrument, who both appear by the same attorney, and interpose substantially the same defense, although by separate answers, can be allowed only one bill of costs, on prevailing in the action.

Appeal from an order of the special term denying a motion to retax costs.

This action was brought by Jonas F. Atkins against Alonzo Lefever and Sarah C. Lefever. The material facts appear in the opinion.

S. G. Young, for the appellant.

Schoonmaker & Hardenbergh, for the respondents.

Atkins v. Lefever.

By THE COURT.*—INGALLS, J.—This action was upon a promissory note, and the defendants interposed separate answers, but by the same attorney. The answer of each defendant set up: 1st. The alteration of the note after its execution. 2d. Usury. Upon the trial both defendants prevailed, and the clerk allowed to each a separate full bill of costs against the plaintiff. The plaintiff objected to the allowance of more than one bill of costs. Upon appeal from adjustment, the special term affirmed the same, and the plaintiff appeals to this court. We are unable to agree with the special term, being convinced that but one bill of costs can be allowed against the plaintiff in this action. The defendants appeared by the same attorneys and interposed substantially the same answer (*Tracy v. Stone*, 5 *How. Pr.*, 104; *Crafts v. Rockerfeller*, 6 *Id.*, 9; *Perry v. Livingston*, *Id.*, 404; *Braden v. Kakhaizer*, 3 *Sandf.*, 760; *Brockway v. Jewett*, 16 *Barb.*, 590, 593; *A. & W. S. R. R. Co. v. Cady*, 6 *Hill*, 265). We are aware that there are decisions which seem not to be in entire harmony with the above. In *Collomb v. Caldwell* (5 *How. Pr.*, 336), it does not appear whether or not the defendants appeared by the same attorneys. In *N. Y. & N. H. R. R. Co. v. Schuyler* (29 *How. Pr.*, 89), it appears that the defendants appeared by different attorneys. Such was also the case in *Bridgeport Fire & Marine Ins. Co. v. Wilson*, (7 *Bosw.*, 699; *S. C.*, 12 *Abb. Pr.*, 209; 20 *How. Pr.*, 511), also in *Slater Bank v. Sturdy* (15 *Abb. Pr.*, 75).

We are not called upon to express an opinion in regard to the rule which should prevail where the defendants sever, and appear by different attorneys who are in no manner connected in business. We are clearly of opinion that but one bill of costs should be allowed under the facts of this case.

The objection taken to the adjustment was sufficiently explicit.

The order of the special term should be reversed, and

* Present, INGALLS, HOGEBOM, and PECKHAM, JJ.

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the clerk of Ulster county directed to readjust the costs in accordance with the foregoing, and conform the judgment in said action thereto. No costs allowed upon this appeal to either party.

PECKHAM, J., concurred.

HOGEBOM, J., expressed no opinion.

*as affirmed
n.s. 63; 3 app. dec. 53*

PEOPLE, *ex rel.* LATORRE, *against* O'BRIEN.

Supreme Court, First District; General Term, Nov., 1868.

ARREST.—DISCHARGE FROM IMPRISONMENT.—STILLWELL ACT.

The provisions of the revised statutes, allowing voluntary assignments by insolvents for the purpose of exonerating their persons from imprisonment, are not applicable to the case of a debtor imprisoned on proceedings under the act of 1831, known as the "Stillwell act."

Appeal from an order.

The relator was arrested under a warrant issued under the act of 1831, known as the "Stillwell act," at the instance of creditors, upon charges of having fraudulently purchased goods on credit, by false representations, and having removed them out of the State. The charges were substantiated in the proceedings against him, and he was committed to jail under the statute.

An application was subsequently made on behalf of the debtor, for an order discharging his person from imprisonment, under the provisions of the revised statutes (2 *Rev. Stat.*, 25). The order having been granted by the city judge, the relator applied to a judge of the supreme court, for a writ of *habeas corpus* to discharge him in pur-

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suance thereof; the discharge being denied, the relator appealed to this court at general term.

Joseph J. Marrin, and *Messrs. Beebe, Donahue & Cooke*, for the relator.

Brown, Hall & Vanderpoel, for sheriff.

G. A. Seixas, for creditor.

CARDOZO, J.—The apparent (for there is not any real) difficulty in this matter seems to arise from the relator's counsel having confined his attention to section 9 of the act of April 26, 1831 (4 *Edm. Stat.*, 465), overlooking or ignoring section 11. The ninth section provides that the final commitment of the defendant shall be to the jail of the county in which the hearing is had, to be there detained until he shall be discharged "according to law." The 11th section points out the law according to which the defendant may be discharged. That section provides that the defendant so committed "shall remain in custody in the same manner as other prisoners on criminal process, until a final judgment shall have been rendered in his favor, in the suit prosecuted by the creditors at whose instance such defendant shall have been committed, or until he shall have assigned his property and obtained his discharge, as provided in the subsequent sections of this act." When the act of 1831 declares that the prisoner shall remain in custody until discharged according to the sections of that statute, it is preposterous to argue that he could be discharged under the provisions of a prior statute. The language of section 11 excludes all other remedies, and restricts the defendant's application for discharge to a proceeding under and pursuant to the provisions of that act. The statute of 1813, reenacted by the revised statutes (2 *Edm. Stat.*, 49), was therefore inapplicable to the relator's case, and the decision of the learned justice below was clearly right, and his order should be affirmed with costs.

INGRAHAM, J.—If the act to abolish imprisonment, &c. is to be considered operative, I concur in the above opinion, affirming the order appealed from. The reason is apparent—viz: that in the proceedings under the twelfth section, the assignment is for the benefit of the prosecuting creditors (*Spear v. Wardell*, 1 N. Y. [1 *Comst.*], 114), while under the act of which the defendant availed himself, the assignment is for the benefit of all the creditors. The order should be affirmed.

Order accordingly.

BRAND *against* FOCHT.

Court of Appeals ; March Term, 1868.

STATUTE OF FRAUDS.—DELIVERY OF BILL OF LADING.

A delivery of property, to satisfy the requirements of the statute of frauds in respect to oral contracts of sale, must be a delivery by the vendor, with the intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with the intent of taking possession as owner.

If the facts do not indicate such mutual intention of the parties, the rule is not satisfied.

If the buyer obtains a bill of lading from the seller, without any intention on the part of the seller to deliver it, and insists on retaining possession, against the remonstrance of the seller, he cannot avail himself of it to make out his title.

Appeal from a judgment.

This action was brought by Christian Brand against Hiram Focht and Robert Gunson, to recover possession of a boat-load of coal.

The complaint averred that the plaintiff was the owner of 172 tons of coal, laden on board the barge Ocean

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Queen ; that the defendants became possessed of the same, and detained it from the plaintiff, wherefore plaintiff demanded that the defendants should deliver the same to him or pay him the value thereof. The defendants denied all the allegations of the complaint, and set up that the property in question belonged to two other persons. On the trial it appeared that in March, 1863, the plaintiff, who was a coal dealer, purchased of the defendants, also dealers in coal, a boat-load of coal, and the price agreed on was \$6 a ton. "It was to be delivered in from twelve days to two weeks—within two weeks." The coal did not arrive in the city of New York until May 8. The defendants then proposed to sell the coal to the plaintiff at \$6.50 per ton, and made out a bill therefor, amounting to \$774, and annexed it to the bill of lading for the coal, and sent the same by their clerk to the plaintiff, telling him he could have the coal at that price. Plaintiff refused to receive and take it at that price, insisting that he had purchased it at \$6 a ton. He then detached the bill of lading from the bill rendered, and returned to the clerk the latter, but retained the bill of lading. The clerk demanded it from him, but he refused to deliver it, insisting that the bill of lading was his. The clerk then told him he could not have the coal. The plaintiff then commenced this action.

At the trial the complaint was dismissed ; and on appeal the judgment of dismissal was affirmed by the superior court at general term. Their judgment, which is now affirmed, is reported in 3 *Rob.*, 426.

The plaintiff appealed to the court of appeals.

Benjamin T. Kissam, for the plaintiff, appellant.—I. The first question raised by the pleading was whether the plaintiff had such an interest in the coal as to entitle him to maintain this action (*SELDEN*, J., in *Fitzhugh v. Wiman*, 9 *N. Y.* [5 *Seld.*], 559). The purchase of the coal, in March, 1863, from the defendant Focht, at \$6.00 per ton (the then market price,) the orders given to A. C. Miller & Co. by the defendant Focht in respect to the

shipment thereof, and the subsequent shipment and consignment to plaintiff in pursuance of such orders, fully and absolutely vested the title of the coal in the plaintiff; the evidence of which is the bill of lading. "It is the document and title of the goods sent" (3 *Kent Com.*, 207-214, marg. p; *Chandler v. Belden*, 18 *Johns.*, 157; *Dows v. Green*, 24 *N. Y.*, 638-643; *Lachrisson v. Ahman*, 2 *Sandf.*, 73-74). "The consignee is presumed in law to be the owner" (SELDEN, J., in *Fitzhugh v. Wiman*, 9 *N. Y.* [5 *Seld.*], 562; *Sweet v. Barney*, 23 *N. Y.*, 335). "The only legitimate construction of the bill of lading is that the delivery was to be to the consignee named, and, excepting as to quantity of property received, cannot be varied by parol" (JOHNSON, J., in *Fitzhugh v. Wiman*, 9 *N. Y.* [5 *Seld.*], 565). And in *Bank of Rochester v. Jones* (4 *N. Y.* [4 *Comst.*], 497), PAIGE, J., says: "If the bill of lading had been delivered to him (Jones) by Foster, he would then have acquired a general or special property in the flour." The defendant Focht lost all control of the property, excepting for the purpose of protecting himself against the insolvency of the plaintiff by stoppage *in transitu* (3 *Kent Com.*, 216, marg.; *People v. Hays*, 14 *Wend.*, 565). The coal, in judgment of law, was constructively in the possession of the plaintiff, and at his risk (*United Ins. Co. v. Scott*, 1 *Johns.*, 115; 2 *Kent Com.*, 499; *The Merrimack*, 8 *Cranch*, 317-327). Delivery to defendant Gunson was equivalent to a delivery to the plaintiff (2 *Kent*, 499, m. p.; *Fitzhugh v. Wiman*, 9 *N. Y.* [5 *Seld.*], 559; *Dows v. Green*, 24 *N. Y.*, 638; *Gibson v. Stevens*, 8 *How. U. S.*, 384; *Stanton v. Small*, 3 *Sandf.*, 230). If any question, under the statute of frauds, exists in this case, it is fully and sufficiently answered, and every objection removed, by the delivery of the coal to the carrier, and also by the delivery of the bill of lading to the plaintiff, and his acceptance thereof (*McKnight v. Dunlop*, 5 *N. Y.* [1 *Seld.*], 537; *Wal'dron v. Romaine*, 22 *N. Y.*, 368; *Boutwell v. O'Keefe*, 32 *Barb.*, 434). In case there was any doubt as to a delivery and

acceptance, the question should have been left to the jury to determine (*Gray v. Davis*, 10 *N. Y.* [6 *Seld.*], 285).

II. There is nothing in the whole case to warrant the conclusion of the court below, that the possession of the bill of lading by the plaintiff, "if not tortious, conveyed no rights or benefit upon him." There is no allegation or evidence that the defendants fraudulently or improperly obtained the bill of lading. It was sent to him at 43rd Street, freely delivered to him, and properly retained by him as an evidence of his title to the coal. The delivery of it was not qualified in any manner. The mere simultaneous handing to plaintiff of a bill or invoice of the coal, stating price at \$6.50 instead of \$6.00, did not affect the delivery of the bill of lading, or plaintiff's right to it. The coal was, in judgment of law, delivered to the plaintiff on the 27th of April, 1863, without any condition whatever annexed to it; the title then vested in the plaintiff, and the bill of lading was the evidence of such title. If there was any condition in respect to the sale or delivery of the coal, it was not alleged nor proved—and in any event was waived (*Smith v. Lynes*, 5 *N. Y.* [1 *Seld.*], 41).

III. The production of the bill of lading, the tender of the freight, the demand and his refusal, gave plaintiff a good cause of action against Gunson (3 *Kent*, 214; *Fitzhugh v. Wiman*, 9 *N. Y.* [5 *Seld.*], 559).

IV. The defendant Focht prevented the defendant Gunson from putting the plaintiff in actual possession of the coal, and was the chief actor in the whole matter. The tender to Focht, and the demand refused, gave plaintiff a good cause of action against defendant Focht (*Latimer v. Wheeler*, 30 *Barb.*, 485; *Van Neste v. Conover*, 20 *Id.*, 547; *Nichols v. Michael*, 23 *N. Y.*, 264).

V. The court below erred in excluding the undertaking executed on behalf of the defendants, for obtaining the return of the coal to them by the sheriff (*Black v. Foster*, 28 *Barb.*, 387, decided at *N. Y.* gen. term).

VI. There was no evidence that the defendants had parted with the possession or control of the property, at

the time of the commencement of this action ; but the contrary.

D. Hawley, for the defendants, respondents.—I. The alleged contract was void under the statute of frauds (*Shindler v. Houston*, 1 *N. Y.* [1 *Comst.*], 261 ; *Ely v. Ormsby*, 12 *Barb.*, 570).

II. There is no evidence that plaintiff directed as to the mode of conveyance, so as to make a delivery to the carrier a delivery to the plaintiff's agent, to take the case out of the statute of frauds, the title and the risk remaining with the consignor (*Meredith v. Meigh*, 22 *Eng. L. & Eq.*, 91 ; *Frostburgh Mining Co. v. N. E. Glass Co.*, 9 *Cush.*, 115 ; *Jones v. Bradner*, 10 *Barb.*, 193).

III. Inserting plaintiff's name in the bill of lading conferred no right until the delivery of the bill of lading to him (*Bank of Rochester v. Jones*, 4 *N. Y.* [4 *Comst.*], 497 ; *Mitchell v. Ede*, 11 *Ad. & Ell.*, 888 ; *Williams v. Allen*, 12 *Pick.*, 297 ; *Buffington v. Curtis*, 15 *Mass.*, 528).

IV. There was no such delivery of the bill of lading as satisfied the statute of frauds, as a delivery of the "evidences" of the coal, and as would thus affirm the contract, or pass the title of the coal to the plaintiff (*Philips v. Bristolli*, 2 *Barne. & Cress.*, 511 ; *Clark v. Tucker*, 2 *Sandf.*, 157 ; *Acraman v. Swift*, 8 *Man., Gr. & Scott*, 449 ; *Shindler v. Houston*, 1 *N. Y.* [1 *Comst.*], 261). The plaintiff's retaining the bill of lading was illegal and fraudulent (4 *Comst.*, 497, *supra*)—not assented to by the vendor, and an illegal and fraudulent possession will not take the contract out of the statute of frauds (2 *Kent*, 496 ; *Baker v. Cuyler*, 12 *Barb.*, 667 ; *Brackett v. Barney*, 28 *N. Y.*, 333 ; *Harris v. Smith*, 3 *Serg. & R.*, 20 ; *Seymour v. Davis*, 2 *Sandf.*, 239).

V. The consignor had the right to impose a condition on the delivery of the bill of lading, that plaintiff must pay \$6.50 (*Mitchell v. Ede*, 11 *Ad. & Ell.*, 888 ; *Abb. on Shipp.*, 328).

VI. It is presumable from the evidence that defendants are only agents for A. C. Miller & Co., and their pos-

session is the possession of the principal (*Clark v. Skinner*, 20 *Johns.*, 465).

VII. The defendant Gunson, an innocent bailee, is not liable without a previous demand of the coal, and no demand is alleged or shown (*Fuller v. Lewis*, 3 *Abb. Pr.*, 383).

VIII. The court committed no error in rejecting the undertaking as evidence. It was not signed or executed by the defendants, or either of them, and no statement of facts contained in it could be considered as admitted by them. A general offer of the same as evidence, and a general exception, raises no question of error here. Besides, the alleged contract being void under the statute of frauds, the dismissal of the complaint was right, and if any error was committed in excluding the undertaking, its admission would not help the plaintiff.

DAVIES, CH. J. (After stating the facts).—This case presents no serious difficulty. The case of *Shindler v. Houston* (1 *N. Y.* [1 *Comst.*], 261) is quite decisive. In this case, as in that, the contract of sale not being in writing, and as no part of the purchase money was paid by the vendee, the contract was void by the statute of frauds (2 *Rev. Stat.*, 136, § 3, subd. 3), unless the buyer "accepted and received" the whole or a part of the property. In the present case it is not asserted that any part of the purchase money was paid, or that there was any delivery of the property in whole or in part, except the alleged symbolical delivery, evidenced by the bill of lading which the plaintiff got into his possession.

A delivery of the property, to satisfy the requirements of the statute, must be a delivery by the vendor, with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intent of taking possession as owner; and this rule can only be satisfied by something done subsequent to the sale, unequivocally indicating the mutual intentions of the parties (*Shindler v. Houston*, *supra*). Now, it is quite clear that these vendors never did, and never

intended to, make any delivery of the coal in whole or in part, to this plaintiff, upon the contract of sale which he sets up. And it is equally clear that they never delivered the bill of lading with any intent to complete and perfect the sale. Nay, it is very manifest that they never intended to part with the bill of lading, except upon the condition and understanding that the plaintiff would purchase the cargo of coal therein mentioned, at the rate of \$6.50 a ton. This he peremptorily declined to do, and detained the bill of lading, against the remonstrance of the defendant's agent. He clearly had no right so to detain it, and now setting it up as evidence of the delivery of the coal, under the contract of sale made in March, is a fraud upon the defendants. They never delivered it to the plaintiff with any such intent or for any such purpose, and it cannot now be permitted to the plaintiff that he should avail himself of this bill of lading, thus improperly retained by him, to make a title in himself to this coal.

The contract of sale not being in writing, as no part of the purchase money was paid, and as there was no delivery in whole or in part, of the property purchased, and no symbolical delivery, it follows that the plaintiff was never vested with the title to this coal. He never had possession of it, actual or constructive; he was not the owner, and cannot, therefore, maintain this action. On the contrary, the evidence conclusively established that the plaintiff was not the owner of the cargo of coal in controversy, and that he was not entitled to the possession thereof. He never acquired any title thereto. This difficulty is fundamental with the plaintiff's right of recovery, and it therefore becomes unnecessary to examine the other question suggested.

The nonsuit was properly granted, and the judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

BEMIS *against* KYLE.*Superior Court of Buffalo; General Term, Dec., 1867.*

IMPEACHING WITNESSES.

When a witness states a particular fact, which it is material for the party who called him to controvert, the latter is at liberty to prove the truth in respect to such fact, even though such proof would tend to affect the credit of the witness.* Hence when a plaintiff's witness, on cross-examination, testified to a promise on the part of the plaintiff to reward him if he should succeed in the action, it was held error to exclude evidence on the part of the plaintiff (who had been a witness in his own behalf) to contradict this testimony.

The rules applicable to the impeachment of witnesses,—stated.

Exceptions.

The action was brought before Judge VERPLANK and a jury. On the trial the plaintiff was examined as a witness on his own behalf, and gave material evidence in support of his right of action.

After the plaintiff had given his testimony, one Parker was sworn as a witness on the part of the plaintiff, and gave material evidence. On his cross-examination, Parker testified, that, on a certain occasion, the plaintiff talked with him about this suit, and said, "I have a hundred dollars for you." "I told him I did not want it."

* It was held in *People v. Skeehan* (49 Barb., 217), that although a party is not permitted to assert or present evidence showing one state of facts to be true, and afterwards to assert or prove to the court that his prior evidence is untrue, or not to be relied on, yet where a witness has given evidence against the side for the support of which he has been called, and the court can perceive good grounds for apprehending that the witness has testified under a mistake of the facts, or intentionally falsely, and there is no bad faith on the part of the party producing the witness, he is to be allowed to give evidence explaining, or even contradicting, his own witness.

That, on another occasion, the plaintiff said to him, "I told my wife if the trial went for me, to give your wife a barrel of flour, and that you and I would go off and have a good time at my expense." The counsel for the plaintiff recalled the plaintiff, and offered to prove by him that no such conversation as that stated by Parker on his cross-examination, had ever taken place between him and Parker; or in other words, to contradict those statements of Parker. The judge, upon the defendant's objection, excluded the evidence, and the plaintiff excepted. The evidence, in respect to the right of action, was conflicting, and the jury rendered a verdict for the defendant.

M. A. Whitney, for the plaintiff.

Grover Cleaveland, for the defendant.

MASTEN, J.—The testimony of the witness Parker, upon his cross-examination, tended to prejudice the plaintiff, in the maintenance of this action. It came from the lips of his own witness, and in his presence, and, if uncontradicted, would naturally detract from the credit which the jury might otherwise give to the testimony of the plaintiff as a witness. It furnished the subject for comment by the counsel of the defendant, and tended to impress upon the minds of the jurors, that the plaintiff was conscious of the untruthfulness of his claim, and of the necessity of fabricating testimony to support it. A party may assail his adversary's witness by attacking his *general credit*; that is, his character as a credit-worthy man. Or, without making an attack upon his *general credit* or character, may assail his credit in the particular action—his *particular credit*.

There is an important, and well settled distinction in the mode of assailing the general, and the particular credit of a witness. It has occasionally been lost sight of. The general credit of a witness, can only be shown, or impeached, by proof of his general character and reputation as a moral and truthful man; and it is not permissi-

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ble to prove particular facts, or specific acts, tending to show that he is not a credit-worthy man. If, upon cross-examination, the witness denies a particular fact or act going to his *general credit merely*, he cannot be contradicted (1 *Phill. Ev.*, 291 ; 1 *Greenl. Ev.*, §§ 449, 461).

The *particular credit* of the witness in the action, may be affected or impeached by proof of particular facts ; as interest in the event of the action, consanguinity, connection in business, &c. &c., with the party calling him ; hostility, &c. &c., to the party against whom he is called ; and especially his *conduct in the action*. And if, on cross-examination, he denies a fact or act going to his *particular credit* in the action, he may be set right by contradiction (*Cow. & H. Notes to Phill. Ev.*, notes 509, 530, 581, 596 ; *McQueen's Case*, 6 *Eng. Com. Law*, 129 ; *Rex v. Yerwin*, 2 *Campb.*, 638 ; 8 *East*, 638 ; *Rixey v. Bayse*, 4 *Leigh*, 330 ; *Starks v. People*, 5 *Den.*, 108 ; *Morgan v. Frees*, 15 *Barb.*, 352 ; *Newton v. Harris*, 6 *N. Y. [2 Seld.]*, 345).

The distinction in the mode of impeaching a witness, in respect to his general and particular credit, is illustrated in *Yerwin's Case*. In that case, the prosecuting witness, on his cross-examination, denied that he had been accused of robbing the defendant, or that he had said that he would be revenged on him, and would soon fix him in jail. Evidence to contradict him as to the *charge of robbing* (this touching his *general credit* only), was excluded ; but evidence as to his *threat* (this going to his *particular credit* in the cause), was admitted.

The rejected evidence, so far as the witness Parker was concerned, was not very material. The inquiry as to him was, under what state of mind and feelings was he giving his evidence ? It would probably make no difference with him, if he believed that he had a promise of reward, whether such was the fact or not. But, the statements of the witness Parker, on his cross-examination, were damaging to the plaintiff as a party to the action, and to his credit as a witness in the action. The fact that he was a party to the action, and interested in the event of it,

touched his credit as a witness, and required that his testimony should be cautiously received, and carefully scrutinized. If to those, the fact be added, that he had corrupted, or attempted to corrupt, witnesses in the action, his testimony should, and probably would, be rejected by the jury, as unworthy of belief.

These statements of Parker related to the *conduct in the action* of the plaintiff, and touched his *particular* credit as a witness therein. The fact stated by Parker was therefore issuable; that is, both parties had the right to give evidence in respect to it. If the witness Parker had denied it, the defendant had the right to establish the fact by other evidence. If the plaintiff had, on his cross-examination, denied the fact, the defendant would not have been concluded by his answer, but would have been at liberty to show the truth by other evidence.

I am of the opinion that the offered evidence should have been received.

It is not necessary to decide whether the rejected evidence would have been admissible, if the plaintiff had not been a witness on his own behalf. It would seem from McQueen's Case, *supra*, that it would have been.

It was said upon the argument, that a party cannot impeach his own witness. If the learned counsel had added, by evidence introduced for that sole purpose, he would have stated the rule correctly.

When a witness states a particular fact, which it is material for the party who called him to controvert, he is at liberty to prove the truth in respect to such fact, even though such proof would tend to affect the credit of the witness (Thompson v. Blanchard, 4 N. Y. [4 Comst.], 303).

There must be a new trial.

CLINTON, J., concurred.

New trial ordered.

MURRAY *against* GALE.

Supreme Court, First District; General Term, Nov., 1867.

LEGAL TENDER.—MEASURE OF DAMAGES.—CONTRACT
PAYABLE IN COIN.

On a contract which is expressed to be for the payment of a specified number of dollars, the measure of damages is that sum in legal tender, although, in the contract, the words "in gold or silver coin" be added. It would be otherwise of a contract to pay or deliver a certain quantity and quality of coin.

Appeal from an order directing judgment on demurrer.

This action was brought by Caroline Murray against Margaret Gale, administratrix of William Harrison, and many other defendants, for the foreclosure of a mortgage given to secure a bond made by Harrison during his lifetime to one Frederick Bronson, an executor. The complaint showed that the deceased, on the 26th day of May, 1846, for the purpose of securing payment to Frederick Bronson, executor of Isaac Bronson, deceased, and assignor of the plaintiff, of "the sum of four thousand dollars in specie, gold and silver coin of the same standard as that by which coins were regulated on the 26th day of May, 1846," executed a bond and mortgage, conditioned to pay the said Bronson, or his assignees, "in gold and silver coin of the standard by which the coins of the United States were regulated on the 26th day of May, 1846," the sum of four thousand dollars, and interest in coin, as aforesaid.

On April 26, 1855, the principal sum secured to be paid by the mortgage was due and unpaid.

At the last-mentioned day, a partition suit was pend-

ing between the heirs to the property described in the mortgage, and who were the defendants in this action.

The defendants and parties to the partition suit desired to pay the mortgage of the plaintiff in legal tender notes.

The plaintiff insisted that the bond and mortgage could not be satisfied or extinguished, except by the payment of gold and silver.

The parties to the partition suit desired a release from the plaintiff in order to sell the premises.

To enable the parties so to do, and at the same time to save the plaintiff's right to be paid in coin, the plaintiff released the mortgaged premises, accepted \$4,151.66 in legal tender notes, which was the number of dollars due on the bond and mortgage; which, however, she received without prejudice to her claim to be paid in gold and silver.

The defendants, thereupon, agreed to deposit the balance of two thousand dollars, the difference between the value of the notes and value of coin, to abide the judgment of the court.

On December 11, 1865, an order was entered in the partition suit, directing the sum of \$2,000 to be deposited in the United States Trust Company, in pursuance of the agreement of the parties, to abide the determination of the court, as to the right of the parties.

And plaintiff accordingly now demanded judgment that the principal and interest were payable in gold and silver coin, and that the sum of two thousand dollars thus deposited in court be paid over to her, with interest.

A number of the defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The following opinion was rendered at special term, sustaining the demurrers:

SUTHERLAND, J.—I shall treat the demurrers to the complaint, which are general, as presenting, and intending to present for decision, the single question, whether

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the plaintiff must deem herself and her bond and mortgage satisfied by the \$4,151.66, which she has received in legal tender notes, or whether she is entitled to receive in addition thereto the \$2,000 in legal tender notes, deposited in the United States Trust Company, under the order of the court in the partition suit, by arrangement between the parties, as and for the difference between \$4,151.66 (the amount due on the bond and mortgage for principal and interest) and the market value of a certain quantity or number of pieces of gold or silver coin, of the standard mentioned in the condition of the bond, amounting by tale, or denominationally, to the same sum.

In my opinion it inevitably follows from the decision of the court of appeals in *Meyer v. Roosevelt* (27 *N. Y.*, 400), holding the legal tender act to be constitutional and valid, not only as to contracts made after the passage of the act, but also as to contracts made before, that this court must consider the plaintiff's bond and mortgage fully paid and satisfied by the \$4,151.66, which she has received in legal tender notes, and that there must be judgment on the demurrers.

The condition of the bond (dated May 26, 1846) is, to pay \$4,000 in three years from the date, "in gold or silver coin, *of the standard by which the coins of the United States were regulated by the laws existing on the 26th day of May, 1846*, with interest at the rate of seven per cent. per annum, payable on the 26th days of May and November in each and every year, in coin as aforesaid."

Gold and silver are used not only for coinage, but extensively for various other useful purposes; hence gold and silver bullion, as a commodity, or as merchandise, has an intrinsic value, not only for coinage, but for such other purposes; and hence gold or silver coin has an intrinsic value as a commodity or as merchandise, and may be treated as such by parties in making contracts; and in construing and enforcing contracts I do not see why the courts should not treat gold or silver coin as the parties have treated it by their contract.

The coinage, or stamping of portions or pieces of these

metals, alloyed with baser metals, by government prerogative, fixes the value of such pieces as money, or coined money; but the regulated standard of a gold or silver coin of a given weight, that is, the proportion by weight of its fine metal and alloy, determines its relative value as a commodity.

Before the legal tender act, money meant coined money, in all legal proceedings to enforce the payment or collection of *money* debts.

It *was* the office of money, or coined money, not only to measure the money value of all commodities, even its own value, viewed or treated as a commodity, but also to pay or satisfy money debts. Indeed, if one may be excused from uttering such a mere verbal truism, value in the abstract, or as measured by money, could not be expressed without money. Hence, it is evident, that before the legal tender act, it followed from the office or capacity of coined money, the coinage system of the United States, its adopted unit of value, and the power of Congress to coin money and to regulate the value of coins, that a promise to pay one hundred dollars was in legal effect a promise to pay, at the option of the promissor, one hundred dollars in any coin which might be a legal tender for one hundred dollars at the time of payment; and hence, that a note for one hundred dollars and a note for one hundred dollars payable in one hundred silver dollars, or in one hundred gold dollars, or in five double-eagles, or twenty half-eagles, with or without the additional words lawful or current money of the United States, was the same in legal effect, for in either case the note could have been paid in silver dollars, or in either of the gold coins.

My excuse for these extremely elementary remarks, must be the peculiar character of the contract in this case.

The contract is to pay four thousand dollars (the principal mentioned in the condition of the bond) and the interest, in gold or silver coin, of the standard by which the coins of the United States were regulated by the laws, on the 26th day of May, 1846, the date of the bond.

As the standard of a gold or silver coin of a given weight, determines its relative value as bullion, or a commodity, the contract may be said to be, to pay \$4,000 and interest, in gold or silver coin of the *value* of like coin of a certain standard specified in the contract.

It is plain then, that by the contract, the parties to it treated the gold or silver coin to be paid or tendered, as a commodity, or as specific articles of a commodity, for the coin is to be valued, of course valued in money, in dollars and cents.

By the contract, the coin tendered in payment is to be valued, and if not of the value or standard called for by the contract, then the difference in values is also to be paid or tendered.

The values and the difference between them, must of course be expressed in money, in dollars and cents.

Now the thing, the coin, which by the contract is to be valued in money, cannot by the contract be treated as money. Money and the thing which it is to measure and express the value of, cannot both be viewed or treated as money, even though that thing be gold or silver coin.

It is evident then, that the parties to the contract by it treated the coin in which the bond is payable, as a commodity, which by the contract was to be of a certain value, or of a value the means of ascertaining which are fixed by the contract.

The court must treat the coin in which the bond is payable, as the parties to the contract, by the contract, have treated it; and what is the result? Of course the result is, that the court must view the contract as a contract to pay a certain sum of money, a money debt in a certain commodity, or in specific articles of a certain commodity at a certain price or valuation, fixed or provided for by the contract. And what is the legal result?

It must be deemed settled, that a contract for the payment of a certain sum of money, a note for instance, in specific articles, at a certain price or valuation, to give the paying party the option or privilege of paying the money

in such specific articles at the price or valuation, but does not give to the party entitled to receive payment the right to enforce payment in such articles, at the price named, or any other price or valuation; that the paying party *may* pay in the specific articles, or commodity, at the price or valuation, but the receiving party *must* receive his debt in money, if legally tendered (*Pinney v. Gleason*, 5 *Wend.*, 394; *Smith v. Smith*, 2 *Johns.*, 235; *Brooks v. Hubbard*, 3 *Conn.*, 58, 60; *Fletcher v. Derickson*, 3 *Bosw.*, 181).

Of course it follows, if the legal tender act had not been passed, but Congress, after the date of the bond, had materially debased or lowered the standard of gold and silver coin, that the plaintiff would have been obliged to receive payment of her debt in such debased gold or silver coin, by tale or count—that her debt could have been paid in any gold or silver coin, at its *then* regulated standard or value, as coin or money which was or might be a legal tender for such a sum or amount of money. It is plain, that this result would have followed from the very terms of the contract, and without reference to the consideration that it was the evident intention of Bronson, to whom the bond was executed, as executor, by the contract, to protect the estate under his charge against the power of Congress to regulate the value of coins, of course to debase them, and that no court could aid a party in thus undertaking by contract to thwart or evade a conceded power of Congress.

The very terms of the contract compel the court to hold, that the plaintiff's claim is not for the coin to be valued, or for its value, but that her claim is for her money debt expressed in dollars, and the interest on it by the contract to be paid in gold or silver coin, &c.

I am not aware that the standard or weight of gold or silver coins (except the weight of half dollars and smaller silver coins, by the act of 1853, and which by the act are made a legal tender for sums not exceeding five dollars), has been lowered, or lessened, or altered since the date of the bond. I cannot see, therefore, how there could have been

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occasion for saying what has been said, as to its construction, legal effects, &c., if the legal tender act had never been passed ; but the legal tender act was passed, and has been held constitutional by a court which controls, and has a right to control, the decisions of this court.

The act does not declare legal tender notes to be coins. The most sanguine alchemist that ever lived, probably never dreamed of converting paper into gold or silver.

A ten dollar legal tender note does not purport on its face to be ten dollars, but does purport on its face to be a promise to pay ten dollars. On its face it purports to be a *promise* to pay money, not to be money. But the act does declare that these notes "shall be lawful money, and a legal tender in payment of *all debts*, public and private, within the United States, except duties on imports, and interest on government bonds, which shall be paid in coins."

Now anything which is a legal tender for a money debt, which a party is by law *obliged* to receive in payment of his money debt, must be money, or considered to be money, for it performs an office, or has a capacity, which nothing but money can perform or have.

It necessarily follows then, from the terms and legal effect of the terms of the plaintiff's bond or contract, and from the legal tender act, and the controlling decisions affirming its constitutionality, that I must hold, as the complaint shows that the plaintiff has received \$4,151.66, the amount due on the bond for principal and interest, in legal tender notes, that the bond has been paid, and that she must consider herself and her bond both satisfied by such payment, for such is the controlling law of the case.

Of course, any one must see that when gold or silver coin is the subject of purchase and sale and delivery, or of pledge, or of special deposit, or of an unlawful conversion, it is perfectly consistent with the foregoing views and conclusions arrived at, for the court to treat it as a commodity, and apply the same rule of damages for its non-delivery, or unlawful conversion, as would be ap-

plied for the non-delivery or unlawful conversion of any other article or commodity.

And to prevent misapprehension of what has been said, and in view of several of the cases growing out of the legal tender act, cited on the argument, and which I have not time more particularly to refer to I will go farther and say, if A. B., in the present condition of things, agrees to sell and deliver 100 bushels of wheat to C. D., or to perform certain services for C. D. for one hundred dollars in gold or silver coin, that I do not see why the court cannot and ought not to treat the agreement as an agreement in the one case to exchange one commodity for another commodity, and in the other case as an agreement to exchange or render certain services for a certain commodity.

An agreement to pay so many dollars in coin, or in coin at a certain valuation by tale or weight is one thing ; but an agreement to pay so many dollars, or to render certain services, or deliver a certain commodity for coin, by tale or weight, is another thing.

The result of the legal tender act is, that gold and silver coins have practically ceased to be currency, and have become, except as to the government, practically exclusively a commodity, and are bought, and sold, and speculated in, and commonly viewed and treated as such.

Why should a court ignore this state of things, unless compelled to do so by the terms of the contract, or by force of the legal tender act ?

Why should not A. B. and C. D. be presumed to have made the supposed agreement in view of the fact that gold and silver coin has, as between individuals, become exclusively a commodity—in view of the fact that a gold eagle is worth fourteen or fifteen dollars in legal tender notes ? Why should not the court consider A. B. and C. D. as having, by their supposed agreement, treated the coin to be paid for the commodity or services as a commodity, and the words “one hundred dollars,” as used by them for the purpose of designating the quantity or number of pieces of coin, at their stamped or coined value, as

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money to be delivered or paid? And if A. B. and C. D. have so treated it, by their supposed agreement, why should not the court so treat it, and consider C. D.'s agreement as substantially an agreement to deliver a certain quantity or number of pieces of coin as a commodity, for a certain other commodity, or for certain services?

In examining the plaintiff's case of a money debt, and her rights under her money bond, in view of the legal tender act, I have not intended to say anything not consistent with the conclusion that, if, in the supposed case, A. B. delivered the wheat or performed the services according to agreement on his part, and C. D. did not pay or deliver the coin according to agreement on his part, he would be legally liable to pay the value of the coin in dollars, that is practically in legal tender notes, for practically legal tender notes are money, and represent dollars.

The agreement on C. D.'s part in the supposed case is not to pay so many dollars, nor to pay so many dollars in coin, or in coin at a certain valuation, but is an agreement to pay so many dollars in coin "for the wheat or for the services."

No debt or duty is due from him until A. B. delivers the wheat or performs the services, and when A. B. does this, the terms of the supposed agreement would not compel the court to hold that a money debt of one hundred dollars was due from C. D., and I do not see why the court could not hold, considering the circumstances under which the supposed agreement was made, and with reference to which the parties must be presumed to have contracted, that C. D.'s duty was, on performance by A. B., either to deliver the coin, or to pay its value in legal tender notes.

There must be judgment for the defendants on the demurrers, with costs.

From the order thus entered, the plaintiff appealed.

Morris S. Miller, for the appellant.—I. The intent of the parties was that the bond should not be satisfied except by payment in coin.

II. An express contract for payment or delivery of gold or silver dollars in specie, is legal, notwithstanding the legal tender act (*Sears v. Dewey*, 14 *Allen*; *Bank of the Commonwealth v. Van Vleck*, 49 *Barb.*, 508; *Dutton v. Pailant*, 52 *Penn.*, 109; *Christchurch v. Farschall*, 54 *Id.*, 71; *Luling v. Atlantic Mutual Ins. Co.*, 30 *How. Pr.*, 69).

III. A contract like this, to deliver goods or commodities, is not a debt to be satisfied by legal tender notes, until after judgment for damages.

IV. The law requires debts to be paid in coin; and an express contract for the purchase of coin is not illegal. And such contract may be in the form of bond and mortgage.

V. The legislation of Congress recognizes a distinction between "coin" and "legal currency or lawful money."

VI. Upon questions arising upon the construction of the statutes of the United States, the decisions of the courts of the United States are final and conclusive, and will be followed by the courts of this State, whatever may be their own views on the question (*Hicks v. Hotchkiss*, 7 *Johns. Ch.*, 297). And the United States circuit court having determined the question that an express contract for the payment of dollars in specie can be enforced, in the case of *Gladstone v. Chamberlain*, before Judge NELSON, on demurrer, and before Judge SMALLEY and a jury, October 25, 1866, and of *Thompson v. Riggs*, before Justice CLIFFORD, to the same effect, this court will follow those decisions.

VII. As the plaintiff did not sue to recover the debt, nor waive any right by accepting legal tender notes, the precise question before the court is, whether a tender of the notes could have extinguished the mortgage.

VIII. The case of *Rodes v. Bronson* (34 *N. Y.*, 649), and *Kempton v. Bronson* (45 *Barb.*, 618), are distinguished from this case, because the words "gold and silver dol-

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lars" are followed, and, the court held, qualified by the words "lawful money of the United States," in lieu of the words herein, "of the same standard, as regulated by law on the 26th day of May, 1846." The decision in *Wilcox v. Morgan*, New York Superior Court (1 *Abb. Pr.*, 174; S. C., 4 *Rob.*, 58), is not, it is submitted, based upon sound principles of law or justice. *Meyers v. Roosevelt* (27 *N. Y.*), and *Roosevelt v. Bull's Head Bank* (45 *Barb.*, 479), and the cases of contracts for the payment of lawful currency, are not in point.

IX. The authorities upon which the decision at supreme court was based, concerning chattel notes, merely affirm the rule that the intent of the parties controls, and applies to the case of the plaintiff, because the manifest intent of the parties expressed is that the payment should be a payment of gold and silver coin.

H. W. Robinson, for the respondents;—Cited and relied on the acts of Congress of February 20, 1862; July 11, 1862, and March 3, 1863 (12 *U. S. Stat. at L.*, 341, 532, 711); and the following cases: *In this State*: *Metropolitan Bank v. Van Dyck*, and *Meyer v. Roosevelt*, 27 *N. Y.*, 400; *Hague v. Powers*, 39 *Barb.*, 427; *Roosevelt v. Bull's Head Bank*, 45 *Id.*, 579; *Kimpton v. Bronson*, *Id.*, 618. *In Massachusetts*: *Wood v. Bullens*, 6 *Allen*, 516. *In Vermont*: *Carpenter v. Bank of Northfield*, 39 *Vt.*, 46. *In New Hampshire*: *George v. City of Concord*, 45 *N. H.*, 434. *In Pennsylvania*: *Shellenberger v. Brinton*, 52 *Pa.*, 9. *In Michigan*: *Van Husen v. Kanonse*, 13 *Mich.*, 303; *Buchegger v. Shultz*, 5 *Am. Law Reg. N. S.*, 95. *In Indiana*: *Reynolds v. State Bank*, 18 *Ind.*, 454; *Thayer v. Hedges*, 23 *Ind.*, 141 (overruling 22 *Ind.*, 282). *In Wisconsin*: *Brieterback v. Turner*, 18 *Wis.*, 140. *In Iowa*: *Warnibold v. Schlieting*, 16 *Iowa*, 240; *Troutman v. Gowing*, 16 *Id.*, 415; *Hintrager v. Bates*, 18 *Id.*, 172. *In California*: *Lich v. Falkner*, 25 *Cal.*, 404; *Reese v. Stearns*, 29 *Id.*, 273. *In Missouri*: *Henderson v. McPhyke*, 35 *Mo.*, 235; *Appel v. Woltman*, 38 *Id.*, 194. *In U. S. District Court, N. Dist. N. Y.*: *Councer v. Steam*

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Tug Griffin, 5 *Am. Law Reg. N. S.* 45, affirmed by NELSON, J., Aug., 1865. He also cited and commented on Griswold v. Hepburn (2 *Duval [Ky.]*, 20); Shoerberger v. Watts (1 *Am. Law Reg. N. S.*, 553); Hintrager v. Bates (18 *Iowa*, 174); Henderson v. McPhyke (35 *Mo.*, 260); Appel v. Woltman (38 *Mo.*, 194); Kimpton v. Bronson (45 *Barb.*, 618); Wilson v. Morgan (4 *Rob. [N. Y. Superior Ct.]*, 58; Rhodes v. Bronson (34 *N. Y.*, 649); Lord BACON Leg. Maxims (3 *Lord Bacon's Works*, 231, *Reg.* 8); Emperor of Austria v. Day (30 *Law J. N. S.*, 690); Metropolitan Bank v. Van Dyck (27 *N. Y.*, 455, and cases cited by DAVIES, J.); Pinney v. Gleason (5 *Wend.*, 394); Smith v. Smith (2 *Johns.*, 234); Fletcher v. Derickson (2 *Bosw.*, 181); 1 *Story Eq. Jur.*, §§ 294-305; *Story on Contracts*, §§ 545, 546; Dunlop v. Gregory (10 *N. Y.*, 241); Hadley v. Baxendale (26 *Eng. Com. L.*, 403); 1 *Story Eq. Jur.*, §§ 301-306); Kneettle v. Newcomb (22 *N. Y.*, 247); Crawford v. Lockwood (9 *How. Fr.*, 547); Harper v. Leal (10 *Id.*, 282).

BY THE COURT.*—CARDOZO, J. —Whatever may be our individual opinions, the constitutionality of the legal tender acts is not an open question in this State (*Metropolitan Bank v. Van Dyck*; *Meyer v. Roosevelt*, 27 *N. Y.*, 400). The point principally argued before us, was very carefully considered, though perhaps not directly involved, in *Rhodes v. Bronson*, 34 *N. Y.*, 649.†

* Present, CARDOZO, BARNARD, and INGRAHAM JJ.

† On the 15th of February, 1869, the supreme court of the United States announced their decision in the case of *Bronson v. Rhodes*, brought before them on appeal from the court of appeals of this State.

This action was brought to redeem real property from the lien of a mortgage made and payable prior to the legal tender act of 1862, and which, by the terms of it, and of the bond, was payable in gold and silver coin, lawful money of the United States. The mortgagor, in 1865, tendered the amount due on the mortgage, in paper money, which he claimed, under the legal tender act of February 25, 1862, was a legal tender. The mortgagee refused to receive paper money, claiming he was entitled to payment in gold and silver coin. The decision of the court of appeals is reported, *sub nom.* *Rodes v. Bronson*, in 34 *N. Y.*, 649.

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The court of appeals discussed the law in two aspects : first, reading the condition of the bond without the words "lawful money of the United States" (which it in fact contained) ; and secondly, including those words.

The supreme court held (reversing that decision) that a contract to pay a certain number of dollars in gold and silver coin, is not distinguishable, in principle, from a contract to deliver an equal weight of bullion of equal fineness ; and the currency acts could not be supposed to be intended to enforce satisfaction of any contract by the tender of depreciated currency equivalent only in nominal value to bullion ; and that the bond was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by the tender of actual payment according to its terms, and not by an offer of only nominal payment.

Without inquiring whether the clauses of the currency act making United States notes a legal tender were warranted by the constitution, in this case, the court declare that even assuming those clauses to be so warranted, a tender of notes was not a performance of the contract within the true intent of the acts, but that, upon a reasonable construction of the act, it must be held to sustain the proposition that express contracts to pay coin dollars, can only be satisfied by the payment of coin dollars.

Mr. Justice DAVIS concurred in the result, namely, that an express contract to pay coin of the United States, made before the legal tender act, was not within the clause of that act which makes treasury notes legal tender in the payment of debts, but stated that if there be any reason in the opinion of the majority which could be applicable to any other class of contracts, it did not receive his assent.

Mr. Justice SWAYNE concurred, resting his opinion entirely upon the language of the contract and the construction of the statute, deeming that the question of the constitutional power of Congress did not arise.

In reference to the form of judgment to be entered in such cases, the opinion of the court, delivered by the chief justice, contained the following directions :—

"Some difficulty has been felt in regard to the judgment proper to be entered on contracts payable in coin. This difficulty arises from the supposition that damages can be assessed only in one description of money ; but the act provides that 'the money of the coin of the United States shall be expressed in dollars, dimes, cents and mills, and that all accounts in the public offices, and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation.'

"This regulation is part of the first coinage act, and doubtless has reference to the coins provided for by it, but it is a general regulation, and relates to all accounts and all judicial proceedings. When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars, and both

Whether that case be treated as a direct adjudication only upon the construction and effect of a bond which contains the words "lawful money of the United States," or whether it should be recognized as also establishing authoritatively the law applicable to a bond not containing those words, is not very material, because at all events the reasoning of the opinion upon the latter subject is convincing. We think the views it expressed upon that point entirely sound, and that it is superfluous either to repeat or attempt to add anything to them here.

It only remains for us to apply them to the present case.

If by "gold coin," a commodity, and not the currency of the country, was intended to be designated, then, as the bond was conditioned to pay a sum of money, viz : \$4000 and interest, in a certain commodity, the tender of so much of that commodity as would at that time have produced in the market the sum of \$4000 of lawful money (and interest) would have discharged the bond.

Or, if the obligor did not tender the commodity, the damages recoverable would be the amount of the debt agreed to be paid, viz : \$4000 and interest (see opinion, pp. 651, 652, 653).

The obligation in this case is not to deliver or pay a specified quantity and quality of gold, but to pay a sum of money, viz : \$4000. Whether it be paid in a commodity or not, it is still to pay a certain sum of money. This is the distinction (Same case, p. 653). If the agreement had

made current in payment, it is necessary, in order to prevent ambiguity, and to prevent a failure of justice, to regard this regulation as applicable alike to both. when, therefore, contracts made payable in coin are sued upon, judgment may be rendered for coined dollars and parts of a dollar, and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgment may be entered accordingly, without such description.

"We have already adopted this rule as to judgments for duties, by affirming the judgment of the circuit court for the District of California in favor of the United States for \$1,388.10, payable in gold and silver coin, and judgments on contracts between individuals for the payment of coin may be entered in like manner."

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been to pay or deliver a certain quantity and quality of a commodity—gold coin, or anything else—upon failure to perform, the promisee might recover the market value of the article at the time and place when and where it should have been delivered, but when, as here, the agreement is to pay so many dollars, whether in a commodity or in money, the amount of money agreed to be paid, and interest, is the only measure of damages for a breach of the covenant.

Without giving the reasons which, in addition to the views expressed by Justice SMITH, lead me to think that the parties to this bond were contracting for the payment of money only, enough has been said to dispose of the only points in this case calling for any remarks, and to show that the judgment below was right, and should be affirmed with costs.

Judgment affirmed.

MCCLELLAND *against* REMSEN.

Court of Appeals ; June Term, 1867.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—MORTGAGE
WITH TRUST TO ACCOUNT.

Either member of a partnership may secure one of its creditors by a transfer of property ; and this may be done by an assignment in the nature of a mortgage, with a trust to account for and repay the surplus, if any.

Appeal from a judgment.

This action was brought by John McClelland, against George Remsen.

The action was for trespass in seizing goods of the

plaintiff. The defendant claimed to justify under a judgment and execution in favor of William F. Howe, against William McClelland and Elizabeth Hasluck, alleging that the property seized belonged to one or both of the defendants in the execution.

The cause was tried at the Kings circuit, before Mr. Justice Lott, and resulted in a verdict for the plaintiff of \$394.55.

It appeared on the trial, that on the 1st of February, 1860, or prior thereto, Elizabeth Hasluck, a married woman, formed a partnership with William McClelland, in the liquor business, in Brooklyn, and that they conducted it in the firm name of William McClelland & Co. On the 2nd of June, 1860, they were indebted to the plaintiff, John McClelland, in the sum of \$357, for liquor and cigars sold and delivered to the firm.

On that day William McClelland, in the name of the firm, executed an instrument transferring to John McClelland the goods and other property of the firm, upon the trust that he should convert the same into cash, and, after satisfying this debt of \$357, with interest, and the charges and expenses incident to the assignment, should pay over the balance of the net proceeds to the firm.

Attached to the instrument was the bill, the payment of which it was intended to secure. Some weeks afterward, the bill remaining unpaid, the plaintiff went to the store, demanded and received possession of the goods, and locked them up. Subsequently, an execution was delivered to the defendant, who seized the property as that of the assignors. The judgment under which it was issued was confessed by Mrs. Hasluck, and she assumed to confess it for McClelland as well as herself.

The judge held that the levy was not justified, and directed a verdict for the plaintiff, to which the defendant excepted.

This decision was sustained by the supreme court, at general term, in the second district, and the defendant now appealed to the court of appeals.

The decision of the supreme court, which was now af-

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firmed by the court of appeals, is reported in 36 *Barb.*, 622, and also in 14 *Abb. Pr.*, 331.

N. F. Waring, for the defendant, appellant.

James Troy, for the plaintiff, respondent.

PORTER, J.—It was the right of either of the firm to secure the plaintiff, as one of its creditors, by a transfer of partnership property (*Mabbett v. White*, 12 *N. Y.*, [2 *Kern.*], 443; *Graser v. Stellwagen*, 25 *N. Y.*, 315).

The assignment, in this instance, was in the nature of a mortgage. It did not divest the entire title, but left a residuary interest in the assignors, which could be reached by their other creditors. Its primary purpose was to secure the payment of the debt, and the trust to account for the surplus was purely incidental. Such a trust is not within the condemnation of the statute, and such a reservation is not unlawful (*Leitch v. Hollister*, 4 *Comst.*, 211; *Curtis v. Leavitt*, 15 *N. Y.*, 141; *Dunham v. Whitehead*, 21 *Id.*, 131).

The judgment of the supreme court should be affirmed.

GROVER, J.—No grounds were stated upon which the motion for nonsuit was made. Hence no question arising upon that motion can be entertained in this court. Nothing was lost by the omission, as the only possible grounds were, that one partner could not dispose of the entire stock of the firm to secure or pay a debt; and that the transfer to the plaintiff was fraudulent and void on its face.

The first of these questions was decided by this court against the defendant in *Mabbett v. White* (12 *N. Y.* [2 *Kern.*], 443), and the last in *Leitch v. Hollister* (4 *N. Y.* [4 *Comst.*], 211).

All the judges concurred.

Judgment affirmed.

BAKER *against* BRINTRALL.*Supreme Court, Fourth District ; General Term, Oct., 1868.*JUSTICE'S JUDGMENT.—FALSE RETURN.—EVIDENCE OF
EXEMPTION FROM EXECUTION.—DEFENSES.

The omission by a justice to keep his docket in a manner which the law prescribes does not render a judgment given by him void ; as the proceedings before him can still be proved by himself.

In an action against a constable for neglecting his duty as an officer, in returning unsatisfied an execution, which he might have collected, upon a judgment in favor of the plaintiff, it was proved that after the execution was issued the defendant was directed to seize certain property and sell it, without regard to whether it was exempt from execution or not. A bond of indemnity being demanded by him, it was executed and delivered to him, and he accepted it and proceeded to take an inventory of a part of the property. A motion for a nonsuit being made on the ground that the defendant in execution was a householder, and was not shown to have had any property not exempt from execution,—*Held*, that conceding the defendant in execution to be a householder, the affirmative of the proposition that she had no property except what was exempt from execution, was upon the person claiming the exemption as a defense,—and there was no error in denying a nonsuit.

The question of exemption is a statutory privilege, and is strictly personal ; it therefore would not avail the defendant, if proved.

Inasmuch as the question of exemption was one the defendant could not raise in his case, the acceptance of the execution and the bond of indemnity, with his consent to act on the execution, and his acting so far as to take an inventory of the property of the defendant in execution, bound him to go on and act as instructed, and estopped him from returning the execution unsatisfied.

Appeal from a judgment.

This action was commenced in a justice's court of Saratoga county, by Harriet Baker against the defendant Joseph H. Brintrall as constable,—for neglecting his duty as an officer in returning an execution issued upon a

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judgment in favor of the plaintiff against one Mary A. Estee, unsatisfied, when the same might have been collected. The defendant denied the complaint. The cause was tried by a jury who found in favor of the plaintiff. The judgment rendered before the justice was appealed to the county court of Saratoga county, where the judgment was reversed. From the judgment of reversal an appeal was brought to this court. The other material facts will appear in the opinion.

J. W. Elighmy, for the plaintiff, appellant.

J. A. Shoudy, for the defendant, respondent.

By THE COURT.*—POTTER, J.—We are not informed upon what ground the judgment before the justice was reversed in the county court. We are therefore left to examine the objections taken by the defendant before the justice, to see if there is any good reason for the reversal, and will proceed to examine these objections.

The justice who rendered the judgment was sworn, and produced the original proceedings of the trial and judgment; this was objected to by defendant, and the objection overruled, and, as I think, correctly. It was necessary that the plaintiff show, not only that the judgment was for a cause of action of which the justice had jurisdiction, but also, perhaps, that the action was for services as a domestic; as a judgment for such a demand, in favor of a plaintiff, is favored by statute (*Laws of 1858*, ch. 107). There is no better method of proving these facts. This statute modified the exemption laws, favoring judgments rendered on a claim for work and labor performed as a domestic. The minutes produced, and objected to, showed this fact, and also, jurisdiction in the justice to try the action.

The judgment was also fully entered upon this paper, containing the proceedings, and the issuing of an execu-

* Present, JAMES, P. J., ROSEKRANS, POTTER and BOCKES, JJ.

tion to defendant. The justice also produced a book, which he called his docket, in which was copied from these minutes, the judgment; the time of entering the same; and the issuing of an execution to defendant as constable; and that it was renewed and returned unsatisfied. This docket was also objected to by defendant, that it was not kept as required by statute, and failed to give dates of issuing, renewing and returning the execution, which objections were also overruled, and, as I think, correctly. It is true, the statute directs that every justice shall keep a book called a docket; and also directs what entries he shall make therein; and it is also true, that the justice entirely failed of keeping his docket as this statute prescribes; but the omission so to keep his book, does not render his judgment void. Proceedings before him can still be proved by himself (3 *Rev. Stat.*, 5 ed., 458, § 179). For certain purposes the docket fails to be evidence, if not kept as the statute directs; but the omission so to keep it, is not jurisdictional.

The justice further proved the loss of the execution, and states the fact that he first delivered it to another constable (one Barton), who had made no return upon it. This evidence was objected to, and a motion made to strike it out, as it might be that such other constable might have satisfied it, which motion was denied. Whether or not this might have been error, it appears that Barton, the other constable, was sworn afterwards, and says, he had the execution about a week, and then carried it back, and left it at the justice's office without collecting anything on it; and the defendant himself proves, that he got the execution in a few days after its date; that he returned it unsatisfied, after getting it renewed. If there had been error before, it was cured by this evidence, that Barton had done nothing with the execution. While the defendant had the execution, the question was raised, whether the property of the defendant in the execution was not exempt, but defendant said, if they would give him a bond (of indemnity), he would go on, and sell. A bond was executed and deliv-

ered to defendant, and he accepted it. An objection was also raised against producing the bond in evidence, and the objection was overruled. It does not appear whether the bond was read to the jury. If it had been, there would have been no error. The proof of its being given on defendant's request was proper: its demand and reception by him may have estopped him from refusing afterwards to act. The plaintiff then offered proof as to what property the defendant in the execution had, while the defendant had the execution; this was objected to. Also the value of some of the property, which was also objected to. Both objections were properly overruled—they were questions directly in issue, and material. The plaintiff then proved positive directions given to defendant, at the time he accepted the bond of indemnity, to sell the property of the defendant in the execution, and information was given to defendant, what property there was, and in what it consisted (the plaintiff had before proved the return of the execution unsatisfied); and then rested.

The defendant then moved for a nonsuit, on the following grounds:

1st. The renewal of the execution must be in writing, signed by the justice, or the execution will be void, and the constable a trespasser.

2nd. The execution was issued by the justice, to Constable Barton, and returned by him. It was therefore dormant until legally renewed, and the defendant would have been a trespasser if he should have attempted it; and the justice had no jurisdiction of the matter, after return of the constable, until he legally renewed the execution.

3rd. The justice had no jurisdiction or right to renew the execution, after it was handed to Barton, until he had Barton's return as a constable on the execution. The presumption is, in the absence of such return, that Barton collected the execution, or passed the same execution over to another constable to collect.

4th. The entries by the justice are not a compliance with the statute.

5th. The evidence shows that Mrs. Estee is a householder, and has been for ten years, and plaintiff has failed to show that she had property liable on execution.

6th. Plaintiff has failed to introduce evidence, sufficient to entitle her to a judgment.

The motion was denied.

The defendant was then sworn in his own behalf, and testified to having received the execution from the plaintiff's attorney ; of searching for property ; of receiving a bond of indemnity ; of being directed to sell property which the defendant in the execution claimed was exempt ; the plaintiff's attorney informing him, that the defendant in the execution had no exempt property, and directing him to sell, whether it was exempt or not ; and that the defendant returned the execution unsatisfied. On cross-examination, the defendant stated that he made an inventory of considerable property, which he named ; and that the plaintiff's attorney informed him that unless he sold, he would be sued ; that he obtained a renewal of the execution, and then returned it unsatisfied. All the remaining evidence in the case relates to the extent of personal property of the defendant in the execution, without giving its valuation : and upon the question whether the defendant in the execution was a householder, defendant in the execution was sworn, and testified that she was without father, mother, husband or children, for whom she provided ; though she had kept house eleven years after the death of her husband, and took in washing, had no other means of support, and hired help, and sometimes boarded her help, and purchased her own provisions since she kept house ; she supported no persons but such as received wages. This presents all the questions that arose upon the trial. Only two or three questions remain to be considered.

First. Was the defendant in the execution a householder ?

Second. If she was a householder, had she property not exempt from execution, which the defendant was bound to sell, in order to satisfy the execution?—and, perhaps,

Third. Was the defendant, after receiving the bond of indemnity, bound to sell the property, whether exempt or not, upon being so directed at the time of executing the bond?

1. At the time the defendant moved for a nonsuit on the ground that the defendant in the execution was a householder, which was the only time this question was raised on the trial, it had been shown that she was in possession of a very considerable amount of personal property. Conceding her to have been a householder, it had not then been shown, and was not thereafter shown, that the property in question was exempt, or was necessary for her to keep house with. The affirmative of these questions would have been with the person claiming the exemption, even had the action been by the party whose property had been taken (*Griffin v. Southerland*, 14 *Barb.*, 450; *Davis v. Prosser*, 32 *Barb.*, 290; *Van Sicklar v. Jacobs*, 14 *Johns.*, 434). *Prima facie*, all property is liable to execution. The justice, therefore, did not err in denying the nonsuit. In this view, I do not think it necessary to decide whether or not she was a householder. The question of exemption, is a statutory privilege, and is strictly personal; it did not therefore avail the defendant, even if it was proved (*Smith v. Hill*, 22 *Barb.*, 656; *Mickles v. Tousley*, 1 *Cow.*, 114; *Earl v. Camp*, 16 *Wend.*, 563). This point, therefore, is of no avail to the defendant.

2. Whether the defendant in the execution had sufficient property to pay the execution, exempt or not exempt, was a question of fact for the jury, and their verdict upon this point cannot be reviewed here.

2. I think, inasmuch as the question of exemption is one that the defendant cannot raise in his defense, his acceptance of the execution, and the bond of indemnity, with his consent to act upon the execution, and his action so far as to take an inventory of the property of the de-

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fendant in the execution, estops him in law from returning the execution unsatisfied. If he was not satisfied with the bond (of which there is no pretense), he should have refused it; if he accepted it, he was bound to go on and act as instructed.

I have been entirely unable to find a good reason for the reversal of this judgment by the county court, and think the judgment of the county court should be reversed, and that of the justice affirmed, with costs.

BOCKES, J. dissented.

BONIFACE *against* RELYEA.

New York Superior Court; General Term, Nov., 1868.

MASTER AND SERVANT.—RESPONSIBILITY OF CARRIER.

Where the defendant was employed by D. to superintend a funeral, and the plaintiff, a passenger by the invitation of D. in one of the coaches furnished by the defendant, was injured through the negligence of the driver,—*Held*, that the fact that the driver of the carriage and horses was their owner, was conclusive in establishing that the relation of master and servant did not exist; and, so far as the defendant's liability rested upon the existence of such relation, he was not responsible for the injury which the plaintiff received through the negligence of the driver.

It seems, that the service, being upon the invitation of D., as between the plaintiff and defendant, was entirely voluntary, and without privity of contract, and that in such a case there was no responsibility for misfeasance on the part of the defendant.

Appeal from a judgment.

This action was to recover damages for an injury alleged to have been occasioned by the negligent act of the defendant's servant.

The defendant was an undertaker, and was employed

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by one Darrow to superintend the funeral of his deceased father.

Darrow testified that he made an arrangement with the defendant to superintend and have the whole and sole control of the burial of his deceased father. That the defendant was to furnish five carriages and horses, the coffin and shroud, and attend to the opening of the grave. He was to send two carriages to the plaintiff's sister and children, and one to the plaintiff, and was to bring them from their houses to the place where the funeral was to take place, and afterwards to bring them back to New York.

The defendant sent the agreed number of carriages, presented a bill therefor to the witness, which was paid. In the bill the witness was charged for two coaches from Brooklyn, eleven dollars; and three coaches from New York, twenty dollars. The plaintiff testified that she rode to the cemetery in one of the coaches furnished by the defendant. That on leaving the cemetery the carriage came down and stopped at a hotel, the driver got off his box and went into the hotel. He had but shut the door of the hotel, when the horses started on a walk; they walked a few steps and then commenced to run away. The carriage struck some obstacle, and the plaintiff was thrown out and injured.

It was further proved that the defendant had said "that seeing the carriage stop he drove up himself to the same hotel and got off and spoke to the driver;" that he said to the driver "come inside and I will settle with you," and that he had hardly got the door closed before the horses started. This evidence, however, was contradicted by the defendant.

The defendant moved to dismiss the complaint at the close of the plaintiff's evidence, on the ground, amongst others, *first*, that there was no evidence that the driver of the carriage was in the employment or under the control or direction of the defendant; and, *second*, that the plaintiff had not shown a cause of action against the defendant.

The motion was denied, and the defendant excepted.

It was proved on the part of the defendant that he did not own or keep any carriages or horses. That the carriage and horses in question were owned by the driver, and were hired for the occasion by one Moss, who was in the employment of the defendant.

The court submitted it to the jury to determine whether the driver was in the employment and under the control of the defendant, charging them, that if they found that the driver was in his service and under his control, the plaintiff could recover, if the driver was negligent and the plaintiff was free from negligence.

The defendant's counsel requested the court to charge the jury that if the defendant was himself an agent, carrying out the directions of his principal (Darrow), he was not liable.

The court refused so to charge, and the defendant excepted.

The jury found for the plaintiff, assessing the damages at four hundred dollars.

The defendant appealed.

C. Brainbridge Smith, for the defendant, appellant.

T. E. Thresher, for the plaintiff, respondent.

By THE COURT.—MONELL, J.—The main questions in this case are presented by the denial of the motion to dismiss the complaint, on the ground that the plaintiff had furnished no evidence that the driver of the carriage was in the employment or under the control or direction of the defendant : and by the refusal to charge the jury that if the defendant was the agent of Darrow, who employed him, he was not liable. I do not think any question can properly be raised now on the evidence subsequently furnished by the defendant, that the carriage and horses were owned by the driver.

The motion to dismiss the complaint was not renewed after such evidence had been given, nor was there any

request to direct, upon such undisputed facts, a verdict for the defendant.

The ground therefore upon which the motion to dismiss the complaint was made, coupled with the request to charge the jury, present the only questions for examination.

The evidence was that Darrow employed the defendant as undertaker, to superintend and have the whole control of the burial of his (Darrow's) deceased father. The defendant was to furnish five carriages and horses, one of which he was to send to the plaintiff, and carry her to the cemetery and back to New York. The carriages were furnished; and the negligent act of the driver of the one sent to the plaintiff, and in which she was returning from the cemetery, caused the injury.

There was no evidence whatever that the driver of the carriage was the servant of the defendant, and such relation could be implied only from the engagement of the latter to furnish carriages for the funeral, and furnishing them in pursuance of such engagement. And in submitting the case to the jury, they were instructed, that if they should find that the driver of the carriage was the servant of the defendant, he was liable; under which instruction the jury were allowed to determine that the relation of master and servant existed from the mere fact of the defendant's engagement with Darrow.

By their verdict they must have wholly rejected the undisputed fact that the driver of the carriage and horses was their owner, which fact necessarily, I think, established conclusively that the relation of master and servant did not exist.

The principle of *respondeat superior* applies only to the immediate employer of the servant or agent through whose negligence an injury occurs. There cannot be two superiors, and the difficulty in all the cases has been in determining whose servant the person was who did the injury; when that is determined, the principle of *respondeat superior* at once attaches, and renders the immediate master or employer liable.

It appears to me to be quite clear, that if it be conceded that the driver of the horses was their owner, and was merely employed by the defendant for the service specified in his engagement with Darrow, that such employment alone would not make the driver the servant of the defendant. The mere hiring of a person is not always sufficient to create the relation of master and servant. There must be, besides the hiring, some degree of actual control over the person hired, and some right to direct him from time to time as the master may see fit ; for the responsibility of the master begins and ends with his control over and his right to direct his servant, and therefore the master is held to a reasonable care and discretion in the choice of a servant.

There was nothing in the contract with the driver for the use of the carriage which created the relation of principal and agent, or of master and servant. By the contract, the driver was left in the free and independent use of his own judgment, means and skill in the execution of it ; and the only power the defendant could exert, was merely such as one party to a contract may always exercise, without incurring the danger of expressly or impliedly establishing a different relation than that of simply contracting parties.

If in this case, by any just implication, the driver could be regarded as the agent or servant of the defendant, within the rule *respondeat superior*, then in every case of hiring a hackney-coach from a public stand, or from a livery-stable—or of a vessel to carry passengers on an excursion—or of a contract to do a specified work—the driver of the hackney or livery coach, or the officers and crew of the vessel, or the contractor, would be the servants of the employer, and the law would imply his sanction of all their acts. So that, if I hire a hackney-coach from one of the public stands to carry me to a given place, and the driver negligently injures another, I am responsible ; or if I hire of the owner a vessel and crew to carry passengers on a pleasure excursion, I must insure their skill and competency, and be made liable for

an injury to a passenger through the negligence of one of the crew. I am not aware of any principle of law which sanctions such a proposition. There would be neither reason nor justice in it. The foundation of the relation of master and servant being the right to select the servant and the right to control and direct him, the owner of the hackney-coach, or of the vessel, in the cases stated, would be the superior, and alone responsible.

The leading English case is *Langher v. Pointer* (5 *B. & C.*, 547), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day. The stable-keeper furnished the driver, through whose negligent driving an injury was done to a horse belonging to a third person, and it was held that the owner of the carriage was not liable. And the case was not affected though the owner of the carriage selected from many the particular servant who drove the horses. The court said "If the driver be the servant of the job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, any more than a hack postboy ceases to be the servant of an innkeeper, where a traveler has a preference of one over the rest on account of his sobriety and carefulness."

And in *Quanman v. Burnett* (6 *M. & W.*, 508), where the owner of a carriage hired the driver, and provided him with a livery, which he left at their house at the end of each drive, and the injury in question was occasioned by leaving his horses while so depositing the livery in their house, the court without hesitation relieved the owner from responsibility. But they said, that if the livery had been left under a general or special order to do so, without leaving any one at the horses' heads, the owner would have been liable; for a person who is not the general master of a servant may make him his servant in a particular transaction, by specially directing him thereto, or by a subsequent adoption of what he has done.

The decision in these cases was put upon the ground that the driver could not be the servant of both the livery-

stable keeper and the person in the carriage ; as LITTLEDALE, Justice, said, " he was the servant of one or the other, but not the servant of one and the other."

In the case of *Powles v. Hudson* (36 *Eng. L. R.*, 162), the distinctions are clearly drawn. The action was for failing to deliver baggage. The defendant was the proprietor of a cab which he let for hire to a driver, through whose negligence the baggage was lost ; and Lord CAMPBELL, Ch. J., said, if the cab and horses were let to the driver, and he was to be considered the bailee, and entitled to make what use he pleased of them, the driver could not render the defendant liable on any contract into which he entered for the use of the cab ; and the plaintiff being without remedy against the proprietor, could sue the driver. There were facts, however, in that case which justified the remark that it was " quite different from hiring a job-carriage, or a carriage and horses to be driven by the hirer, or his servants, when the hirer becomes bailee, and can in no sense be considered the servant of the proprietor." Most of these decisions, as well as *Miligan v. Ridge* (12 *Adol. & E.*, 737), and *Allen v. Haywood* (7 *Id. N. S.*, 960) ; *Martin v. Temperly* (4 *Q. B.*, 298) ; *Gayford v. Nichols* (9 *Exch.*, 702), are reviewed at length, and fully approved in *Blake v. Ferris* (5 *N. Y. [1 Seld.]*, 48), where MULLETT, J., after stating several kinds of servants who, though actually employed by a third person, are, in fact, employed for and in the name and at the expense of the primary principal, and are continued subject to his control, says : " But when a man is employed in doing a job, or piece of work, with his own means and his own men, and employs others to help him, or to execute the work for him and under his control, he is the superior who is responsible for their conduct, no matter who he is doing the work for. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded."

I may also refer to *Kelly v. Mayor, &c. of N. Y.* (11

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N. Y. [1 *Kern.*], 432); *Conrad v. Trustees of Utica* (16 *Id.*, 158); *Storrs v. City of Utica* (17 *Id.*, 104. Applying the principles established by the cases referred to, to the one before us, it is apparent that the relation of master and servant did not exist between the defendant and the driver; and as the defendant's liability rests, in part at least, upon the existence of such relation, he is not responsible for the injury the plaintiff received through the negligence of the driver.

It may be said, however, that although the relation of master and servant did not exist, or could not fairly be presumed from the mere act of hiring the driver, yet that the defendant made the driver his servant by asking him to go into the hotel and he would settle with him. But I do not see how that fact alters the case. It may be that the invitation to the driver contributed to the accident, inasmuch as it might be said that the driver would not have left his horses had he not been solicited by the defendant to go into the hotel. But if the driver was his own master, as I have endeavored to show he was, and not subject to the will of the defendant, then his accepting the invitation was a purely voluntary act. He could have declined it; and it cannot be pretended that the defendant could even have directed him to obey the request, or could have exercised any other power or control over him in the matter.

The driver being the superior, he could not become the servant of the defendant, except under some contract, express or implied, creating him such—a mere tortious act contributing to the accident not being sufficient to authorize any such implication. As well might a stranger who had invited the driver into the hotel, be held to have made the driver his servant, as to imply any such relation from a like act of the defendant. If, therefore, the liability of the defendant rested upon the relation of master and servant (*Stevens v. Armstrong*, 6 *N. Y.*, 435), it was necessary to establish such relation affirmatively by competent proof; which the plaintiff entirely failed to do in this case.

It was not enough, in my judgment, to show that the carriage and driver were furnished by the defendant, without also showing some power over, or right to control the driver, or some fact to indicate that he was in the defendant's service. Instead of furnishing some such evidence, the case went to the jury upon bare presumptions or conjectures, and they were left to imply the relation of master and servant from the mere fact of employment.

It seems to me that the plaintiff wholly failed to establish that the driver of the carriage was the servant of the defendant, in any sense that would render the latter liable; and that, therefore, there was no question for the jury to pass upon.

But there is another reason arising under the second ground of the motion to dismiss the complaint, which will in some degree illustrate the difficulties in the way of a recovery in this action.

The plaintiff was a passenger riding in the carriage upon the invitation of Darrow. As between her and any of the other persons the service was entirely voluntary. There was neither contract nor privity of contract, and the well-settled rule that the omission to do a voluntary act incurs no responsibility (*Thorn v. Deas*, 4 *Johns.*, 84), applies, it seems to me, to this case. It is true, if one voluntarily undertakes to do a thing, and does it amiss, he is responsible for the misfeasance; but all the cases of misfeasance are of failure to perform a contract, and there is not, that I am aware of, a case of misfeasance not founded on a contract.

If the defendant had undertaken with the plaintiff to carry her, and had carried her so negligently as to cause her to be injured, he might be liable for the misfeasance, for the law would probably imply that the contract was to carry her safely (*Weed v. Panama R. R. Co.*, 17 *N. Y.*, 332); and such a contract might possibly be implied between the defendant and Darrow; but the plaintiff was neither a party nor privy to any such contract; and nothing can be implied from the transaction which would en-

able the plaintiff to recover upon any such ground (*Nolton v. Western R. R. Co.*, 15 *N. Y.*, 444). But for an injury caused by negligence, carriers of persons may be liable, not upon any contract, express or implied, but for the violation of a duty which the law imposes upon them. This was so held in *Nolton v. Western R. R. Co.*, *supra*. In that case, however, the defendants had contracted to carry the mails, and also the mail agent, and had received the plaintiff as such mail agent, and he was injured by their negligence. The court, in sustaining the action, put its decision upon the ground that the defendants had undertaken to transport the plaintiff, and, although a voluntary undertaking, they were liable.

The case of the plaintiff is no stronger than this. If I engage a carriage of a stable-keeper to carry a person from my house to his own, and he is injured by the driver's negligence; or, if I carry him in my own carriage, with my hired servant, and he is injured, am I liable for the injury? I think not. In those cases I can at most be held to exercise ordinary care, and am not answerable for the want of care of the servant; so that, even assuming that the driver of the carriage was the servant of the defendant, the plaintiff, a mere passenger without hire, could not recover, unless, as in the case stated (of a person to whom I lend my carriage and horses) I can be held responsible for the want of care of my servant.

The conclusion I have reached renders it unnecessary to examine the exception to the refusal to charge the jury that, if the defendant was the agent of Darrow, and furnished the carriages as his agent, Darrow, and not the defendant, was liable. The proposition, as matter of law, was correct, and it was error to decline to charge it if there was any evidence upon which it could operate. I think there was some evidence. Darrow engaged the defendant to furnish the carriages; the defendant had none of his own, and procured others—acting, therefore, in the *quasi* capacity of agent for Darrow, and rendering him liable to the owners for the same.

But for the first reason stated, I am of opinion that the

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judgment should be reversed, and a new trial granted, with costs to appellant, to abide the event.

JONES, J., concurred in reversing the judgment on the first ground stated,—*i. e.*, that the evidence did not show the relation of master and servant between the defendant and the driver.

BUNN *against* VAUGHAN.

Court of Appeals, January Term, 1867.

TRUSTS.—WHAT TRUSTS VEST IN THE COURT ON THE
DEATH OF TRUSTEE.—PARTIES.—ADMISSIBILITY
OF ACCOUNTS.

A mortgage upon real property, executed to the mortgagee in trust to collect and apply the principal and interest, is a trust in personal property; and if the trust is perfectly defined, so as not to rest in the discretion of the trustee, his executor may maintain an action for the foreclosure of the mortgage.

In such an action a pass-book kept by the deceased trustee, containing entries of payments of interest, may be admitted in evidence.

Appeal from a judgment.

This action was brought to foreclose a mortgage given by the defendant to one Oakley Bunn, the plaintiff's testator, to secure the payment of \$2000, with annual interest, during the natural life of one Lavinia Vaughan the wife of the defendant, for her separate maintenance. The cause came on for trial in October, 1864, before a referee, and judgment was rendered for the plaintiff.

From the facts disclosed at the trial, it appears that the defendant and his wife lived unhappily together for many years; and, desiring to live apart, on the 6th day

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of December, 1851, entered into a tripartite agreement with the said Bunn, as mutual trustee, whereby a separation was brought about, and provision made for the wife's support.

By the terms of the agreement it was provided that the defendant should execute the above mentioned mortgage to the said Bunn, as trustee, conditioned for the payment of the annual interest of \$2000; that the interest of such sum should be expended by the trustee in the support of the defendant's wife; and that, whenever in his judgment the interest should not prove sufficient for that purpose, such portion of the principal as might be deemed necessary should be collected by him and applied toward the wife's maintenance. On default of payment for thirty days, the whole principal was to become due and payable. The annual interest was paid to December 6, 1860. On the 6th of December, 1861, the interest became due, and \$30 was paid thereon, leaving the sum of \$110 due and unpaid. No further payment was made.

In July, 1862, Bunn, the trustee, died, leaving a will making the plaintiff sole executrix, legatee and devisee. The will was proved and letters granted to the plaintiff. In December following the death of the trustee, the plaintiff, as his executrix, commenced the foreclosure in question, claiming the right to execute the trust created by said agreement.

Upon the trial a pass-book, kept by the trustee, which contained the payments of interest received from the defendant, and the payments made to the defendant's wife, was admitted in evidence under the objection of the defendant (the latter having previously introduced parol evidence of its contents) that the private memoranda of the plaintiff's testator were not evidence against the defendant, and that such evidence was improper and immaterial.

The judgment of the referee was affirmed by the supreme court at general term; and the defendant appealed to the court of appeals.

J. McGuire, for the defendant, appellant.

Dana, Beers & Howard, for the plaintiff, respondent.

SCRUGHAM, J.—No discretionary power was conferred upon the plaintiff's testator by the tripartite agreement or the mortgage executed to him therewith.

The amount which he was authorized to apply to the support and maintenance of the *cestui que trust* was not left to his discretion, but was such only as should be actually necessary for that purpose.

The power was thus perfectly defined, and could be duly executed, as well by another as by the trustee named in the instrument. The trust was in personal property, and, on the death of the trustee, devolved, with the property, upon his representative.

While it is conceded that this is the rule at common law, it is claimed that it is abrogated by our statute of uses and trusts, and that the trust, upon the death of the trustee, vests in the supreme court, and is to be executed under its direction, by some person appointed for that purpose. This would be so if the trust were in real estate; but it is not, and the section of the statute of uses and trusts which vests the trust in the supreme court upon the death of the trustee, does not apply to trusts in personal property. This is clearly shown in the opinion of Mr. Justice COWEN, in *Kane v. Gott* (24 *Wend.*, 641), by an examination of the statute so thorough, and arguments so convincing, as to preclude further profitable discussion of the subject; and the point in this case may properly be answered in the very words of Judge COMSTOCK in delivering the opinion of this court in *Savage v. Burnham* (17 *N. Y.*, 561): "This is a trust in personal property with which the statute of 'uses and trusts' in lands has nothing to do."

At the trial several exceptions were taken to the rulings of the referee as to the admissibility of evidence; but the only one referred to by the appellant, in the points submitted on this appeal, is to the admission of a

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written memorandum or account kept by the trustee, showing payments made to him by the defendant. The defendant had subpoenaed the plaintiff to produce this, and before its production had given parol evidence of its contents. It contained no charge against the defendant, but was an admission of payments made by him.

Under these circumstances it was properly admissible in evidence, and, if its admission by the referee had been error, the defendant could not have been prejudiced by it, as the evidence was in his favor, and did not prevent his proving payments larger than, or additional to, those mentioned in the memorandum.

The judgment should be affirmed.

All the judges concurred except BOCKES, J., who expressed no opinion.

Judgment affirmed.

HITCHINGS *against* VAN BRUNT.

Court of Appeals ; June Term, 1868.

CONSTRUCTION.—CONDITIONAL JUDGMENT.

Where an agreement is made between an attorney and his client, providing for a large compensation if successful in the cause, even though the latter is informed that he must certainly succeed, the transaction is regarded by the law with great suspicion, and in case the meaning of the instrument is not transparently obvious, the client is entitled to a construction the most favorable of which it will admit.

An agreement between attorney and client provided that an appeal from the decision of a surrogate should be taken to the supreme court, and that the attorney should attend and argue the same, and in case of success, and of the decision of the surrogate being reversed by the supreme court, his compensation was to be \$1,000 in addition to costs and allowances by the court. Another clause provided that in case it should be necessary

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"to contest" the case in the court of appeals, the plaintiff should have such further compensation as might be just, and a final provision that in case the defendant settled the case without his approval, he was to be immediately liable for the full compensation "as herein provided." The attorney was not successful on the appeal in the supreme court.—*Held*, that the agreement had performed its whole office the moment the decision against them was given in the supreme court, and that he was entitled to nothing under it.

Where a judgment, reversing a judgment of the court below, contained a qualification, providing for an affirmance of the judgment appealed from upon the performance of a condition by the plaintiff, and the plaintiff did not consent to the correction, but appealed, with stipulations for absolute judgment against him, if the judgment should be affirmed, and it was affirmed,—*Held*, it was too late for him to get the benefit of the condition fixed by the court below.

Appeal from an order.

Samuel Hand, for the plaintiff, appellant.

Philip S. Crooke, for the defendant, respondent.

BACON, J.—The agreement upon which this action is brought is one between an attorney and his client, providing for a large compensation upon the success of the former in conducting the cause, where the client was assured that the case was one which not only stood very strong for him, but in which he must succeed.

In considering such a transaction it may not perhaps be necessary to go to the extreme length of some of the cases which hold that where a security is thus taken, the absolute presumption of unfairness arises wherever the relation of counsel and client exist (*Evans v. Ellis*, 5 *Den.*, 640 ; *Howell v. Ransom*, 11 *Paige*, 538), but it is proper to invoke the well-settled doctrine announced by this court in *Nesbit v. Lockman* (34 *N. Y.*, 167), that the law looks upon such a transaction with great suspicion, that it will be regarded with jealousy and scrutinized with care, and that the presumption is against the propriety of the transaction.

This rule it is manifestly just to take into account as

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applicable to the interpretation of the instrument in question. If the meaning is not transparently obvious—if it will admit of a construction favorable to the client, he is entitled to that construction, not only upon the ground above suggested, but upon the familiar principle that the construction of an instrument produced by one as the essential foundation of his cause of action, is to be taken most strongly *contra præferentem*.

Above most, if not all, other classes in the community, a lawyer, to whom important interests are intrusted, and in whom great confidence is reposed, should be careful not to expose himself to the imputation of exacting hard terms from, or taking advantage of either the necessity or ignorance of his client, to secure a benefit to himself.

Now what did the agreement provide for? The plaintiff, as the counsel for the defendant, had contested the probate of the codicil of Elias Hubbard's will before the surrogate, and had been defeated. The client was persuaded into trying the experiment of an appeal to the supreme court, upon an assurance of success, and agreed to pay liberally for such a result. The instrument accordingly provided that such an appeal should be taken, and that plaintiff was to attend to and argue the same, and in case of success, and the decision of the surrogate was reversed by the supreme court, the compensation of the attorney was to be \$1,000 in addition to such costs and allowances as might be granted by the court. There was another clause in the agreement, that in case it should be necessary "to contest" the case in the court of appeals, the plaintiff should have such further compensation as might be just, and a final provision that the defendant was not to settle the case without the approval of the plaintiff, and in case he did so settle, was to be immediately liable for the full compensation "as herein provided."

The construction of the main and important part of the instrument admits of no doubt. It provided for compensation upon a clearly-specified contingency, to wit, success on the appeal to the supreme court. If the plaintiff had succeeded in that appeal, he would have been entit-

led, as is remarked by the judge in the court below, to that sum, even if the case had been appealed by the unsuccessful party, and the judgment of the supreme court had been reversed. But as he was not successful on the appeal, he was entitled to nothing under his agreement, which had performed its whole office the moment the supreme court made its decision upon that appeal.

The final clause in the agreement cannot be construed to revive the claim which had become defunct by reason of the failure of the event on the occurrence of which, alone, a right to demand, or a duty to pay arose. "The full compensation" therein spoken of was the compensation "herein provided," that is, provided for in the former part of the agreement, which was \$1,000 in case of success in the supreme court. The clause was applicable by the clearest implication to the cause in the supreme court, and to a settlement which might be made while the case was still pending there and undetermined, and it ceased to be operative the moment the decision there was made, and the appeal had proved unsuccessful. I agree with the counsel for the respondent, that the word "contest" in the second clause of the agreement was understood and intended by the parties to apply to the case of a possible contest arising upon an appeal by the parties who were upholding the codicil in case the surrogate's decree should be reversed in the supreme court.

Both the plaintiff and the defendant obviously counted on success in that court, and the contest in view was, as it seems to me, one against an adversary who should by a further appeal threaten to deprive them of the fruits of their anticipated victory. The agreement will admit of this construction without doing violence to its language, and in a case of this kind I think the defendant is entitled to such an interpretation. The instrument did not contemplate an appeal to be presented by the plaintiff, on behalf of the defendant, after he had been defeated in the supreme court. This was a state of things not within the expectation of the parties, and not provided for in the agreement.

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The counsel of the defendant was therefore right in asking the judge upon the trial to charge :

1. That the compensation of \$1,000 was only in case the plaintiff succeeded in the supreme court ; and

2. That the agreement in the latter clause, that in case of settlement by the defendant she was to be immediately liable for full compensation as herein provided, meant such compensation as was specified in the agreement, viz. : \$1,000 in case the plaintiff succeeded in the supreme court, and not otherwise. These requests were refused, and the defendant's counsel excepted. The refusal thus to charge was, in my view, erroneous. For this error the judgment was in the supreme court reversed, and a new trial ordered, and that judgment should be affirmed.

In the judgment of the supreme court a qualification was annexed providing for an affirmance of the judgment rendered on the verdict, on the condition that the plaintiff remitted all but \$200 of the recovery ; and the counsel for the appellant now asks this court, if we come to the conclusion that the order for a new trial was right, to give him the benefit of that condition here, and still allow judgment to stand for \$200. I think the plaintiff is too late to ask the benefit of this condition. He did not consent to the correction, but appealed to this court, and on taking his appeal he stipulated that if the order should be affirmed, judgment absolute should be rendered against him. *Lanman v. Lewiston R. R. Co.* (18 N. Y., 493), holds explicitly that an appeal to this court from an order granting a new trial, lies only where the party obtaining the verdict is content, if he cannot sustain it, to fail wholly, in his action or defense ; and that, where the order is for a new trial, unless the plaintiff will remit a part of his verdict, he cannot appeal and retain the benefit of the alternative judgment for a reduced amount. The order should be affirmed, and judgment absolute rendered for the defendant, with costs.

All the judges concurred.

KREITZ *against* FROST.*Supreme Court, First District; Special Term, June, 1868.*MOTION FOR JUDGMENT.—ALLEGATIONS OF MISTAKE.—
DENIAL OF MOTION.

The fact that a plaintiff moves for a judgment, instead of moving to strike out a false answer, is no objection to granting the former, as the right to judgment follows the striking out of a false answer.

Where a plaintiff avers a mistake on his part in taking a conveyance of property which he insists is wrongly described in the instrument of conveyance, and asks to have the defendant adjudged to correct the mistake *in the conveyance*, and the defendant, in his answer, says that *he* made a mistake in the *contract of sale*, and that the property he intended to sell was the one described in the conveyance, and asks leave to have the *contract* reformed;—his omission to allege that there was a mistake also on the part of the plaintiff, in the *contract*, renders the matter set up in the answer irrelevant, and the answer constitutes no defense.

The denial of a motion to strike out an answer as frivolous does not prevent a motion to strike it out as sham.

Motion for a judgment.

The defendant owned two houses contiguous to each other, on the same street, and numbered 203 and 205. The plaintiff alleged that he made a contract to purchase from defendant No. 205; that when the defendant delivered to the plaintiff's attorney the papers and abstract of title, he substituted by mistake or otherwise the papers appertaining to No. 203, and the title to the latter premises was passed; that upon an assessment of taxes the error was discovered, and a demand made for a conveyance of the premises agreed upon, and the plaintiff now sues to have the defendant adjudged to correct the mistake in the *conveyance*. The defendant's answer alleged that he intended to sell No. 203, and not No. 205; that the title was

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rightly passed ; and he asked leave to have the *contract* reformed.

Upon the premises No. 203 a higher ground rent was payable than upon the premises No. 205. Certain letters written by the defendant, which were put in evidence, tended to show that the defendant had expressed his willingness to correct his mistake, and referred to his attorney as authorized to do so. It was also proved that the plaintiff was allowed to take possession of the premises he claimed to have bought, and occupied them ever since, without objection on the part of the defendant.

H. H. Morange, for the plaintiff.—I. The defendant's objection to notice of motion cannot avail him. The right to judgment follows as a matter of course if the answer be stricken out (*People v. McCumber*, 18 *N. Y.*, 315).

II. The motion is for judgment on account of the answer being sham and false. The essential element of a sham answer is its falsity (*Nichols v. Jones*, 6 *How. Pr.*, 257). The words "sham" and "false" are synonymous (*People v. McCumber*, *supra*).

III. The defendant does not deny that the plaintiff has been for nearly a year, and is now, in the occupancy of the house and lot agreed to be sold to him. If he were not, why does he permit him to remain, or why does he not attempt to collect rent from him, and why does he receive rent from the house adjacent ?

IV. The letters show that the defendant never pretended that the plaintiff was in the wrong house, until he discovered that he could economize \$30 a year ground rent, and then, willing to take advantage of his own wrong, he puts in this answer in order to coerce a settlement by delay.

V. The defendant cannot have the contract reformed. It has been carried out by him without objection, and he put the plaintiff in possession of the identical house purchased.

VI. No issue is presented by the answer. It is eva-

sive. To permit such a pretended defense to stand, would be blocking up the administration of justice, and give a helping hand to parties who endeavor to take unjust advantage of their neighbors.

VII. There is no mistake as to the identity of the house. The only error which the defendant now perceives, is that he has kept the house paying the highest sum for ground rent. He knew that at the time of sale, and it can afford him no ground for a rescinding of the sale, or canceling the contract.

VII. The motion for judgment should be granted.

A. Prentice, for the defendant.

INGRAHAM, J.—I see no objection to granting this motion in the fact that the plaintiff asks judgment instead of striking out the answer. The right to judgment follows striking out a sham answer. In *People v. McCumber* (18 N. Y., 315), the notice of motion was to strike out and to render judgment. This motion was granted, and the order was affirmed. Although it is better to follow the provisions of the Code, still I do not think it necessary to deny the motion on that ground. Upon the merits I entertain more doubt. An answer is sham, if it is false. In *People v. McCumber*, the judge says: "The defense may be sham for the sole reason that it is false. So it may be sham if it does not set up a defense." Do either of these rules apply to this answer?

The plaintiff avers a mistake on his part in taking an assignment of a lease different from the one intended, and asks to have the defendant adjudged to correct that mistake. The defendant says he made a mistake in the contract of sale, and that the lease he intended to sell was the one he did assign, and asks to have the contract reformed.

There is nothing to show this to be clearly false, although there are some matters in evidence which throw much doubt on the truth of it. Cardwell's affidavit says that the plaintiff understood he was to pay and did pay

\$241.87, which was the highest ground rent. The plaintiff was allowed to take possession of the house he claims to have bought, and has occupied it ever since without objection from the defendant until plaintiff discovered his mistake. In the letter of January 28, defendant expressed his willingness to correct the error, and refers to Mr. Prentice, his counsel, as authorized to do so. These matters throw great doubt on the *bona fides* of the answer.

The answer does not show any defense. A mistake by the defendant in the contract, would not entitle him to have it reformed, especially when he has subsequently carried out the contract as made, and suffered the party to take possession of the property so sold without objection. The defect in the answer is that it does not show the plaintiff to have made any mistake in the contract. Without such an allegation, the whole matter set up in the answer is irrelevant, and constitutes no defense. The denial of the motion to strike out the answer as frivolous does not prevent a motion to strike it out as sham.

In this case I doubt very much the truth of the answer; the facts set up constitute no defense; there is no issue made by it requiring a trial; and there is no good reason for keeping it on the record.

Under all the circumstances, I think the motion should be granted.

QUINN *a*ainst LLOYD.

New York Superior Court ; Special Term, Dec., 1868.

ATTORNEY'S AUTHORITY.—SUBSTITUTION OF ATTORNEY.

An attorney has no authority, without the knowledge and consent of his client, to consent to vacate a judgment which is pending and secured on appeal. Such an act being outside of the ordinary duties of an attorney, no advantage can be taken of such consent, by either the defendant or his sureties on appeal.

A consent for substitution, given by an attorney to his client, precludes the attorney from acting subsequently in the action, notwithstanding the fact that no order has been entered on that consent.

Motion to vacate a stipulation.

The action was brought by Charles Quinn, administrator, &c., against James T. Lloyd.

MCCUNN, J.—This is a motion to set aside a stipulation given by an attorney without the consent or knowledge of his client, vacating a judgment, which judgment was pending on an appeal to the general term of this court, and which was amply secured on the appeal. It is claimed that the defendant against whom this judgment was obtained is insolvent, and has left the State, and that the only opportunity left for plaintiff to receive satisfaction of his claim is any right or claim he may have acquired by virtue of the bond on appeal, and that, as the consent vacates the judgment, the bondsmen on the appeal are released.

It is quite clear, from the affidavits in the case, that

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the attorney for the plaintiff exceeded his power in giving such a consent. The judgment was for over one thousand two hundred dollars, and was obtained in May last. A motion was made for a new trial, upon the ground of newly-discovered evidence, and denied by this court. Subsequently, an appeal was taken to the general term, and when that appeal was pending, and when the party plaintiff in interest was absent for his health from the State, his attorney agreed and accepted fifty dollars, and vacated the appeal, and sent the cause back to the calendar for a trial by jury.

Now, this was all done by the attorney, after he had signed and delivered a consent of substitution—a consent, although no order was entered thereupon, yet a consent which was known to exist by defendant's attorney. The excuses offered to this court by the two attorneys (plaintiff's and defendant's) for their course in this respect are of the most trifling and unreliable kind, and must not be allowed to stand in the path of justice, if it be in the power of this court to remedy the same.

Before I assign my reasons for believing that the consent to vacate this judgment is null and void, I will call the attention of those interested in this case to the statutes of this State covering such transactions:

Any attorney who shall be guilty of, or consent to, any deceit or collusion, with the intent to deceive the court or any parties, shall be deemed guilty of a misdemeanor" (2 *Rev. Stat.*, 237, *Laws of 1813*).

"Any attorney found notoriously in default of record or guilty of any deceit, or malpractice, or misdemeanor, may be suspended or put off the roll," &c., &c. (1 *Rev. Laws*, 417, § 5).

Again, the revised statutes declare that the delaying suit, or willfully receiving money on account of disbursements not made or incurred, forfeits treble damages.

These and other acts were passed in order to protect clients and suitors, as far as possible, from just such practices as have been resorted to in this case. Of all

professional men, none should be so strictly held to an honorable course as the attorney and counselor, because they know, or are presumed to know, their duties, and the responsibilities attached to those duties; therefore, their every act should be scrutinized by the courts in which they practice, and any errors committed by them, or delinquencies perpetrated, should be repaired or punished at once.

I know that the rule has been insisted upon that an attorney under certain circumstances can discontinue his suit at any time, and allow his client to seek a remedy through another advocate; but this he must not do to the prejudice of his client. An attorney cannot, by taking part of a claim in judgment, or one in litigation, satisfy the whole. This rule has been so frequently held that it has almost become elementary. When the judgment has become well secured on appeal, as the one under discussion has been, and where the defendant has left the State and is entirely worthless, an attorney for plaintiff does more than an ordinary act in the premises when he consents to a new trial, because he releases the sureties, the only real parties upon whom he or his client could call for a payment of his just claim. This rule was laid down in the case of *Gaillard v. Smart* (6 Cow., 385).

In the case of *Shaw v. Kidder* (2 How. Pr., 224), it was held that an attorney could not settle a suit and conclude his client in relation to the subject in dispute, without special authority.

It may be argued that the consent to a new trial was not a settling of the suit in this case. It was, however, a settlement to all intents and purposes, for it released all responsible parties connected therewith and against whom any claim could be made, of any responsibility.

The doing of an act by an attorney whereby the interests of his client would be injured or ruined, as in this case, is not the performing of his ordinary duties in the suit; I shall hold that it is doing that which he has no

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right to do, nor has he, nor the counsel on the other side, any right to connive at it; and I shall further hold that no advantage can be taken of such a consent, — neither by the defendant in this action nor by his sureties on appeal.

The rule is that an attorney has all the authority for the conducting and managing an action, and for the collection of the debt; there, however, his services end, his authority goes no farther. Indeed he has no further or greater authority for the benefit of his client, although he may think he has. Now he has no right to compromise a debt, or take a part and give a satisfaction-piece for the whole. He has no right to bind his client to an appeal-bond, although it may be for his client's interest.

He cannot compromise and discontinue a suit brought to recover possession of lands, even if he gets a conveyance of the greater part of the land in dispute. This is the doctrine laid down in the cases of *Holker v. Parker*, 7 *Cranch*, 436; *Murray v. House*, 11 *Johns.*; *Lewis v. Grammage*, 1 *Pick.*, 347; and *Filby v. Miller*, 25 *Penn.*, 264.

The doctrine strictly applicable to this case is the rule in equity laid down in the case of *Howe v. Lawrence* (2 *Zab. N. J.*, 99), tried in the court of chancery, New Jersey. Indeed, it is a case right in point. There it was a stipulation to grant a new trial; here it is a like stipulation. The chancellor, in his opinion setting aside such a stipulation, says: "The stipulation to waive a judgment and grant a new trial was not an agreement for the conduct of the case; it was a deliberate surrender of his client's rights, a surrender which I conceive the counsel has no power to make, and which, if he had the power, justice would never permit to be enforced." * * * This is just and righteous language, and I shall adopt the principle contained therein in guiding me in the disposal of this case. The same rule was established in the celebrated case in New Hampshire (*Pike v. Emerson*, 5 *N. H.*), where the judge held that the court has the power, without doubt, in a case of fraud or mistake, to relieve a

party from the effects of such a stipulation. It operates thus : That the plaintiff in this action would be justified in proceeding with his remedy against his attorney ; but the rule is now settled, and it is the just rule and practice, for the court to relieve the client without reference to the responsibility of his lawyer. It would be a harsh rule—indeed, it would be unjust—to permit one party to obtain an undue advantage over another by reason of the negligence or misconduct of that other's attorney. Such was the equitable rule held by our supreme court in the case of *Sharp v. The Mayor*. I can cite a large number of cases, all establishing beyond a doubt my right to interfere and set aside the agreement or stipulation in question ; but even if there were not a single authority in the books to warrant my course, I would be justified—reasoning from principles rather than decisions—in not allowing our courts to be used by parties in perfecting, through the forms of law, the ruin of a party who has employed a negligent or unworthy attorney. I shall further hold, in this case, that the consent for substitution given by the attorney to his client precluded said attorney from acting in the action, notwithstanding no order had been entered upon that consent, and that consequently his action afterwards in granting a new trial, on the payment of fifty dollars, was illegal and void. The stipulation must be vacated and set aside as null and void.

VANDUSEN *against* WORRELL.*Court of Appeals, January Term, 1867.*

ACTION.—EVIDENCE.—MORTGAGE.

An action lies by the receiver of the property of the grantor in a warrantee deed, against the grantee in such deed, to prove that the deed, though absolute in its terms, was in fact a security in the nature of a mortgage.

In such an action the plaintiff may recover the price for which the grantee has sold the land, deducting the amount due the grantee, and a reasonable compensation for his trouble in effecting a sale.

Appeal from a judgment.

This action was brought by Charles H. Vandusen, as receiver of Philo Haskins, against Daniel Worrell, claiming to recover from the defendant the proceeds of the sale of certain lands, or of the value thereof, with certain deductions, on the ground that the lands were conveyed to the defendant by way of mortgage for the security of a certain debt. The defendant claimed to be the absolute owner, and denied all liability. The facts are sufficiently stated in the opinion of the court. The referee found in favor of the plaintiff; and the supreme court, at general term in the eighth district affirmed his judgment.

P. L. Ely, for the defendant, appellant;—As to the erroneous admission, on the part of the referee, of parol evidence tending to contradict or vary the legal import of the deed, cited and commented on the following authorities: *Stevens v. Cooper* (1 *Johns. Ch.*, 425); *Moran v. Hays* (*Id.*, 339); *Mead v. Lansing* (1 *Hopk. Ch.*, 124); *Russell v. Kinney* (1 *Sandf. Ch.*, 34); *Cook v. Eaton* (16

Barb., 439) ; *Webb v. Rice* (6 *Hill*, 219) ; *Sturtevant v. Sturtevant* (20 *N. Y.* 39) ; 2 *Story Eq. Jur.*, § 1531.

John T. Murray, for the plaintiff, respondent.—I. The plaintiff, as receiver, was the proper party to bring the action ; the creditor, subsequent to his appointment, not having such power (*Seymour v. Wilson*, 19 *N. Y.*, 417 ; 15 *How. Pr.*, 355 ; *Edmonston v. McLoud*, 19 *Barb.*, 356).

II. The referee committed no error in admitting evidence in the plaintiff's behalf (*Marks v. Pell*, 1 *Johns. Ch.*, 594 ; *Strong v. Stewart*, *Id.*, 166 ; *James v. Johnson*, 6 *Id.*, 417 ; *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 *N. Y.* 4 [*Seld.*], 416 ; *Chester v. Bank of Kingston*, 16 *Id.*, 336 ; *Sturtevant v. Sturtevant*, 20 *Id.*, 39).

HUNT, J.—On the 17th day of June, 1846, Philo Haskins, being the owner of about forty-eight acres of land, executed to the defendant and one Joshua Worrell his mortgage upon the same, to secure the payment of two hundred dollars, and accompanied the same by his bond. On the 21st day of January, 1846, Joshua assigned his interest in the bond and mortgage to the defendant. On that day the defendant lent to Haskins a further sum of three hundred dollars, and Haskins and wife executed to him a warranty deed of the forty-eight acres. This deed was given as security for the three hundred dollars then loaned, and for the amount remaining unpaid on the bond and mortgage before mentioned. The defendant and his wife afterward sold the premises to William B. Follett for the sum of fourteen hundred dollars.

This action is brought, asking a judgment that Worrell was a trustee of Haskins for the balance, after deducting the three hundred dollars loaned, the amount due on the bond and mortgage, with a reasonable compensation for the trouble of the defendant, and that he be directed to pay over such balance. The referee found a balance of twelve hundred and twelve dollars to be due to the plaintiff as receiver of Haskins, for which he rendered

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judgment in his favor, and the general term of the eighth district affirmed his judgment. The defendant now appeals to this court.

But a single question is presented for our consideration, to wit: was it competent for the plaintiff to prove that the deed from Haskins to Worrell, although in form an absolute conveyance, was in fact, by the engagement of the parties, a mortgage merely? This question was decided in favor of the respondent in *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 *N. Y.* [4 *Seld.*], 416, and was again decided by this court in the same manner, in June, 1866, not yet reported, in the case of *Loveridge v. Oyer*.

Judgment should be affirmed with ten per cent. damages.

PARKER, J.—The parol evidence admitted by the referee upon the trial, tending to show that the deed from Haskins to the defendant was intended as a mortgage, was properly received (*Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 *N. Y.* [4 *Seld.*], 416; *Sturtevant v. Sturtevant*, 20 *N. Y.*, 39).

The referee found the fact that it was intended as a mortgage, upon sufficient evidence. Hence lies conclusion of law that the plaintiff was entitled to recover the money received by defendant upon a sale of the premises, after deducting the sums and interest which it was given to secure, and reasonable charges for effecting the sale, of which the defendant has no right to complain.

The judgment appealed from should be affirmed with costs.

All the judges concurred in affirming the judgment.

54 affirmed
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THE MANHATTAN OIL CO. *against* THE CAMDEN AND AMBOY RAILROAD.

Supreme Court, First District; General Term, Dec., 1868.

ACTION AGAINST CARRIERS.—PARTY DEFENDANT.—SPECIAL CONTRACT.

Where merchandise is delivered to one of several connecting railroad companies, under a contract with such company, for its transportation to a point upon the road of another such company, the owner cannot maintain an action against the latter company founded upon the common law liability of carriers.*

* When a cause of action has accrued against carriers by reason of loss of goods or baggage, or injury to passengers, or other breach of carrier's duty or contract, upon a route composed of two or more connecting lines, it often becomes a matter of considerable embarrassment for the practitioner to determine against which of the several connecting companies he should proceed.

The *questions of fact* are not easy to determine; it is not always practicable to trace the course of goods, and ascertain at what point they were lost or injured, so as to bring home actual negligence to the servants of either company. Nor is it always easy to ascertain clearly the relations sustained by the connecting companies with each other with reference to the business.

To these difficulties is added another,—that of the uncertain state of the law in reference to the liability of connecting carriers. The following cases will illustrate the course of decision upon this subject in England and in this country, and may be profitably referred to in connection with the authorities cited in the case in our text. It will be observed that they are not harmonious. Each is fully stated, and the jurisdiction in which it was determined is mentioned, in order that the practitioner may compare it with the others, and give due weight to the different rules laid down.

A carrier who takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, undertakes *prima facie* to carry the parcel to its destination; and the rule is not varied by the fact that the place is beyond the limit

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The remedy is only upon the contract, and the latter company are entitled to the benefit of any exceptions in the contract made with the former.

Appeal from a judgment.

within which the carrier professes to carry. Thus, where a parcel was delivered at Lancaster, to the Lancaster & Preston Railway Company, directed to a person at a place in Derbyshire, and the person who carried it to the station offered to pay the transportation, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it, and the parcel was lost after it was forwarded from Preston, where the L. & P. railway connected with other lines;—*Held*, that the railway company that first received the parcel from the owner were liable for its loss (*Exch.*, 1841, *Muschamp v. Lancaster & Preston Junction Railway Co.*, 8 *Mees. & W.*, 411).

[This case of *Muschamp* is the leading *English* case on the subject. It holds the receiving carrier to a stricter responsibility than most of the American cases do; but some of the recent decisions in our courts show an inclination to adopt the principle there laid down, rather than those usually applied by the American courts.]

If carriers receive a package to carry to a particular place, whether they themselves carry it all the way or not, they must be said to have the conveying of it to the end of the journey, and the other parties to whom they may hand it over are their agents, and the company are clearly liable, unless the facts show that their responsibility has determined. Their not having taken the amount of the carriage is immaterial, if explained by the fact of their not knowing what that amount would be (*Q. B.*, 1851, *Watson v. Ambergate, Nottingham & Boston Rw. Co.*, 3 *Eng. Law & Eq.*, 497; 15 *Jur.*, 448).

The rule that railway companies who receive goods and book them for a certain destination, are carriers throughout the entire route, has been extended in England to common carriers who carry from a place within to a place without the realm. The rule that one holding himself out as a carrier between two termini is bound to carry, within reasonable limits, all goods tendered to him, applies, though one of the termini is a place out of the realm (*C. P.*, 1854, *Crouch v. London & Northwestern R. R. Co.*, 25 *Eng. L. & Eq.*, 287; 14 *C. B.*, 255; 23 *Law J. N. S.*, 73; 18 *Jur.*, 148; 2 *Com. Law R.*, 188).

If a carrier contracts to carry goods to, and deliver them at, a particular place, his duty at that place is precisely the same, whether his own conveyance goes the entire way, or stops short at an intermediate place, and the goods are conveyed by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, as his own clerk would have been at the place where his own conveyance stops (*Exch.*, 1857, *Crouch v. Great Western Railway*, 29 *Law Times*,

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This action was brought by the Manhattan Oil Company (plaintiffs and appellants), against the Camden and Amboy Railroad and Transportation Company (ap-

354; distinguishing *Collins v. Bristol & Exeter Railway Co.*, *Exch.*, 1 *H. & N.*).

Where a company give a receipt for goods, specifying they are to be delivered at a point beyond their own terminus, on the route of another road, on presentation of the receipt, they are liable for a loss beyond their terminus (*S. C. Ct. of Appeals*, 1857, *Kyle v. Laurens Railroad Co.*, 10 *Rich. Law*, 382).

Although the power of a railroad company to make a contract for the transportation of persons or property beyond their own lines is not expressly granted by the act of incorporation, it may be conferred by implication, as necessary to the proper and profitable exercise of the power, specifically enumerated in the charter (*Me. Supreme Ct.*, 1859, *Perkins v. Portland, &c. R. R. Co.*, 47 *Me.*, 573).

The N. Y. Act of 1847 (*Laws of 1847*, ch. 270, § 9),—providing that where two or more railroads are connected, any company owning either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place,—applies as well where one of the connecting roads is beyond the State, as where all are within it. It also enables a company to bind itself by a special contract for the delivery of goods within a limited time, at a place on a connecting route, in another State (*N. Y. Court of Appeals*, 1862, *Burtis v. Buffalo & State Line R. R. Co.*, 24 *N. Y.*, 269).

Railway companies, as common carriers, may make valid contracts to receive freight at, or convey it to, points beyond the limits of their own road, and thus become liable for the acts or neglects of other carriers, not under their control. In regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, may fairly be considered as embraced within them, it is not competent for the company to adopt the acts of their agents and officers so long as they prove beneficial, and, when they prove otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers (*Vt. Supreme Ct.*, 1855, *Noyes v. Rutland, &c. R. R.*, 27 *Vt.* [1 *Wms.*], 110).

A railroad company, chartered with full power and authority to do such corporate acts as are permitted to other companies incorporated for similar purposes, is authorized to contract to deliver freight at points which could be reached only by passing it over connecting roads: but it has no power to bind the companies owning the connecting roads, without their consent or acquiescence (*Ga. Supreme Ct.*, 1858, *Rome R. R. Co. v. Sullivan*, 25 *Ga.*, 228).

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pellants and respondents). The cause was tried at the circuit, before Mr. Justice CLERKE, in January, 1867.

The material facts were as follows :

A railroad corporation receiving goods for transportation to a place situated beyond the line of their road, on another railroad, which connects with theirs, but with the proprietors of which they are not shown to have any connection in business, and taking pay for the transportation over their own road only, are not liable, in the absence of any special contract, for the loss of the goods, after their delivery to the proprietors of the other railroad (*Mass. Supreme Ct.*, 1854, *Nutting v. Connecticut River Railroad*, 1 *Gray*, 502. And see *Elmore v. Naugatuck R. R. Co.*, 23 *Conn.*, 473).

The American rule is that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as may be inferred from the marks, the carrier is only bound, as to the transportation beyond his own terminus, to deliver them according to the established usage of the business in which he is engaged, whether that usage were known to the party from whom they were received or not (*Phil. Dist. Ct.*, 1856, *Jenneson v. Camden & Amboy R. R. Co.*, 4 *Am. Law Reg.*, 234).

A railroad company, who receive goods marked for delivery at a place beyond their terminus, are not, without an express contract, liable for the destruction of the goods by fire after they have duly delivered them at the end of their own road to other carriers to complete the transportation (*Conn. Supreme Ct.*, 1856, *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 *Conn.*, 468).

In the absence of any special contract, a railroad company is not bound, as a matter of course, to carry freight beyond the terminus of its road; but if it is directed to a place beyond, it is bound to deliver it over to the proper custody, to insure its due transportation (*Ga. Supreme Ct.*, 1853, *Rome R. R. Co. v. Sullivan*, 25 *Ga.*, 228).

A railroad company receiving merchandise, and undertaking to cause it to be transferred over its own and other connecting roads, assumes the responsibility of forwarding merchants, as well as of common carriers; and in the former capacity they are bound to supply, for the guidance of the successive carriers, suitable way-bills, with the needful directions as to the destination of the goods, so expressed as to be free from ambiguity, and intelligible to persons of ordinary capacity conversant with the business. If they forward the goods with way-bills that are substantially sufficient, they are not liable for a misappropriation of the goods by some of the connecting companies (*Mass. Supreme Ct.*, 1863, *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 *Allen*, 254).

That where a company receives freight to be transported over several connecting lines, the burden is upon them to show delivery by them to the

The defendants were a corporation created by the laws of the State of New Jersey, and engaged in transporting freight from Philadelphia to New York as carriers for hire.

next lines (*Vt. Supreme Ct.*, 1860, *Brintnall v. Saratoga & Whitehall R. R. Co.*, 32 *Vt.*, 665).

A carrier who undertakes to forward goods beyond the terminus of his own route, is bound by any instructions given by the owner, as to the selection of carriers beyond his route (*N. Y. Ct. of Appeals*, 1865, *Johnson v. N. Y. Central R. R. Co.*, 33 *N. Y.*, 610).

A carrier received goods to be carried to Albany, and to be forwarded thence to New York, with instructions to forward them by the P. line. On the arrival of the goods at Albany the proprietor of the P. line refused to receive them; and the carrier forwarded them by a freight barge, on board which they were lost.—*Held*, that the carrier was liable for the loss. On the refusal of the steamboat proprietors to receive the property, the carrier should either have communicated the fact to the plaintiff, and awaited further instructions, or should have relieved himself from liability by depositing the goods for safe-keeping in a suitable warehouse. The facts in this case disclosed no such emergency as warranted the carrier in deviating from his instructions on the ground that the safety of the property required it. *Ib.*

A receipt note specifying the station to which the goods are to be carried, with notice printed thereon that the company will not be responsible for loss, &c., of goods forwarded by them, beyond their termini, by other carriers, amounts to a contract to carry to the station specified only, although the owner of the goods, at the time of taking the receipt note, writes in pencil the address of the consignee, which is at a place beyond the company's terminus (*Exch.*, 1853, *Fowles v. Great Western R. R. Co.*, 16 *Eng. L. & Eq.*, 531; 22 *Law J. N. S.*, 76; 8 *Exch.*, 699; 7 *Railw. Cas.*, 421).

Where there is an express stipulation in the receipt to deliver at the terminus of the road of the company who receive the goods, a memorandum in the opposite margin "to be shipped for C." from thence, does not enlarge the agreement, so as to render the carrier liable for a loss after he has put the goods in a proper way of such transportation by delivering them to a proper railroad company for the purpose (*Phil. Dist. Ct.*, 1856, *Jenneson v. Camden & Amboy R. R. Co.*, 4 *Am. Law Reg.*, 234).

When it does not appear that the carrier receiving goods "for through transportation" contracted in behalf of the company whose railroad forms an ulterior portion of the route, nor that such company had a joint interest in the contract, the consignees may interpose and countermand the transportation as to the latter part of the route; and such company cannot insist on carrying so as to earn the charges therefor (*Ga. Supreme Ct.*, 1866, *Withers v. Macon & Western R. R. Co.*, 35 *Ga.*, 273).

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The plaintiffs' agent in Cincinnati delivered to the Union Transportation and Insurance Company, a corporation of the State of Pennsylvania, also engaged in the

Where the company exact excessive charges for the carriage of goods, both by their own line and the connecting line, it being paid under protest, the person so paying may recover back the excess upon the whole charge from the company to whom he paid it (*Exch.*, 1858, *Parker v. Bristol & Exeter R. R. Co.*, 6 *Exch.*, 702; 6 *Eng. Railw. Cas.*, 776).

By the act of Congress of June 15, 1866 (14 *U. S. Stat. at L.*, 66), authority was conferred upon "every railroad company in the United States, whose road is operated by steam," * * * "to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for the transportation of fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said road or connection may be proposed."

The foregoing cases relate directly to the liability of the company who first receive the goods.

The liability of the connecting company by which the goods may be forwarded, has been the subject of discussion in the following cases:

Goods were shipped by sea to Charleston, directed to a consignee in the interior, in the care of the railroad company whose road ran from Charleston.—*Held*, that the company were not liable as carriers, without proof that the goods came to their possession. Their liability for a loss before that must rest upon some contract to receive the goods, and default in respect thereto (*S. C. Ct. of Appeals*, 1855, *Maybin v. South Carolina R. R. Co.*, 8 *Rich. Law*, 240; 1857, *S. C. R. R. Co. v. Bradford*, 10 *Id.*, 307).

Where one of several connecting roads receives goods and payment of freight, and gives a receipt, stipulating that the goods shall be transported over the others, and it is shown that such freight was divisible between the several roads, these facts do not necessarily show a joint contract. But where the one of such companies receiving the goods, had advertised that all the roads had made a joint arrangement for transportation over their lines, and that a duplicate receipt must be taken and forwarded to the agent of the connecting road, in order to fix responsibility upon that company;

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business of transporting freight as carriers for hire, a quantity of oil for transportation to New York. The receipt, or bill of lading, given by the Union Transportation & Ins. Company, was in the following form :

—*Held*, that under these circumstances a joint contract between the companies might be inferred, and one of them was liable for a loss which did not occur upon its road (*S. C. Ct. of Appeals*, 1857, *South Carolina R. R. Co. 7 Rich.*, 201).

The same company afterwards gave notice that they would be liable for merchandise after it came into their possession, but no farther, and their receipts given contained a clause to similar effect.—*Held*, that they were then not liable as joint contractors (*S. C. Ct. of Appeals*, *Bradford v. S. C. Railroad Co.*, 10 *Rich. Law*, 221).

An arrangement or course of business existed between two railroad companies whose roads were upon the same general route, but did not actually connect with each other, by which goods, which had been carried to the termination of one road, and were destined to some point upon or beyond the line of the other, were delivered to the second company with a bill of the expenses already incurred, from which, if found to be correct, a way-bill was made out.—*Held*, that the second company were only responsible as warehousemen, and not as common carriers, for goods so received and stored by them, until the delivery of the bill of expenses (*Mass. Supreme Ct.*, 1862, *Judson v. Western R. R. Corporation*, 4 *Allen*, 520).

When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off immediately ; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods (*N. Y. Ct. of Appeals*, 1864, *Michaels v. N. Y. Central R. R. Co.*, 30 *N. Y.*, 564).

A common carrier cannot, by a general notice, exonerate himself entirely from his legal duty and liability for property which is delivered to him for transportation, or fix the amount beyond which he will not be held responsible, in case of injury or loss ; although such property is delivered to him by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over his own line, and then, as agent of the consignor, to send it forward by a carrier (*Mass. Supreme Ct.*, 1863, *Judson v. Western R. R. Co.*, 6 *Allen*, 486).

Where goods were delivered to one railroad company, and their receipt for them was delivered to the agent of two other companies, whose roads formed a part of a continuous route, and the agent gave a receipt for the

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UNION LINE.

UNION TRANSPORTATION AND INSURANCE CO.'S



FAST FREIGHT LINE.

*Via Little Miami, Steubenville, and Pennsylvania
Railroads.*

H. W. BROWN, Agent, No. 27 West Third Street,
Cincinnati, Ohio.

.....
The Union Transportation and Insurance Company,
which is Proprietor of the "✱ Union Line," and which is-

goods, agreeing to transport them,—*Held*, that the latter companies were liable for loss of the goods resulting from their being sent in a wrong direction from the point at which they should have been taken under the engagement entered into by the agent, unless they could show that the miscarriage of the goods was under circumstances that would relieve them from responsibility (*N. Y. Com. Pl.*, 1863, *Le Sage v. Great Western Railway Co.*, 1 *Daly*, 306).

The liability imposed by 2 *N. Y. Rev. Stat.*, 5 ed., 693, § 67,—making companies owning connected roads liable as carriers,—does not extend to charge one company for the act or neglect of another which previously received the goods and injured them. It applies only to the company originally receiving and undertaking to convey the goods (*N. Y. Supreme Ct.*, 1864, *Smith v. N. Y. Central R. R. Co.*, 43 *Barb.*, 225).

Railroad companies forming in connection one entire route,—*Held*, not partners, under the circumstances, so as to render one liable for goods lost on the road belonging to another (*Straiton v. N. Y. & New Haven R. R. Co.*, 2 *E. D. Smith*, 184).

A contract specifying that the goods are to be carried "to Toledo for Detroit," is performed by carrying them to Toledo, and delivering them to a connecting company there to be forwarded; and such connecting company, if no connection in business is shown, receives the goods under a common law liability, and not under the special contract; though it would be otherwise if the contract in terms applied to the carriage for the whole distance (*Mich. Supreme Ct.*, 1867, *McMillan v. Mich. S. & N. I. R. R. Co.*, 16 *Mich.* [3 *Jenn.*], 79, 123).

Where goods are received by a railroad company, and a receipt given specifying that they are to be sent to, and delivered at a place on the route of a connecting company, and one price is charged for the entire transportation, the connecting company are not liable for a loss upon their own route,

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sues this Bill of Lading, is a Corporation of the State of Pennsylvania, having a real capital.

It owns and controls the Cars of its Line, which are

by a peril which the receiving company stipulated in the receipt that *they* would not be liable for. The contract is entire, and if the connecting company are liable at all to the owner, they are entitled to the benefit of any exception in the contract (*Ho. of Lords*, 1859, *Bristol & Exeter Railway Co. v. Collins*, 7 *Ho. of L. Cas.*, 194; 29 *Law J. N. S. [Exch.]*, 41).

A railroad company, which receives the cars of another company upon its track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assumes towards the passengers the liability of common carriers of passengers (*Mass. Supreme Ct.*, 1851, *Schopman v. Boston & Worcester Railway*, 9 *Cush.*, 24).

A railroad company which advertises that stages will run from their station to other places off the line of the railway, and sells tickets, at their stations, for such places, that is, to carry upon the railway to the nearest station and then by stage, will not become liable to a passenger receiving injuries upon the stage, after he leaves the railway, the company having no ownership, or interest in the stages. Neither the tickets nor the advertisement constitute a special contract to carry as far as the ticket reaches (*Conn. Supreme Ct.*, 1862, *Hood v. N. Y. & N. H. R. R. Co.*, 22 *Conn.*, 1).

Where a company advertises to sell tickets including passage to places beyond their route by means of a connecting line of stage coaches, and the ticket bears the name of the conductor of the railway, the jury cannot infer from merely these facts, that the purchaser of the ticket made a special contract with the company for his safe transportation over such connecting line. It is well understood by the public that the through ticket in such a case is only for convenience of payment, and that the passenger is to look to each line as the carrier on its own road. It might be otherwise where a participation in profits or joint control is shown (*Conn. Supreme Ct.*, 1852, *Hood v. N. Y. & New Haven R. R. Co.*, 22 *Conn.*, 1).

A railroad company by giving permission to another railroad company to use a portion of their track, do not bind themselves to make their track safe, nor to put it in repair, nor to make any change in its existing state; nor are they under any obligation to the passengers of the other railroad to furnish safe means of transit; and the claim of passengers who may be injured for damages is on the company with whom he immediately contracts (*N. H. Superior Ct.*, 1854, *Munch v. Concord R. R. Corporation*, 9 *Fost.*, 9).

A railroad company are responsible for an injury sustained by a passenger in their cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon their road, although

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new and of "Broad Tread," intended to run through between the Eastern and Western cities, irrespective of change of gauge. The "✱ Union Line" reaches the East

the switch is provided by the proprietors of the other road, and attended by one of the servants, and at the expense, of such other company (*Mass. Supreme Ct.*, 1849, *McElroy v. Nashua & Lowell R. R. Corp.*, 4 *Cush.*, 400).

The undertaking of a company in carrying the owner of a drove of cattle in a car provided for the purpose in the cattle train, is only that of ordinary passenger carriers, and does not render them liable for injuries to the person occurring on the track of another road over which the trains of both companies ran, and solely by the fault of the other company (*Vt. Supreme Ct.*, 1857, *Sprague v. Smith*, 29 *Vt.* [3 *Wms.*], 421).

Although the rule may be different for freight, through passenger tickets for a trip over connecting lines, issued in the form of coupons for each successive company, are to be regarded as distinct tickets for each road. The first company is looked upon as merely the agent of the others for selling (*Vt. Supreme Ct.*, 1857, *Sprague v. Smith*, 29 *Vt.* [3 *Wms.*], 421).

Where a railway company employed an individual to carry passengers to and fro between a village and a station on their railroad, such individual furnishing his own conveyances, teams, and drivers,—*Held*, 1. That the business being promotive of the objects of incorporation, and not against public policy, was a lawful one, and that the company was estopped from denying the validity of a contract to carry a passenger in that mode. 2. That were it otherwise, the company was nevertheless liable in damages for an injury caused to a passenger going from the village to the station, by the overturning of the vehicle through the negligence of the owner or his servant [19 *Wend.*, 534; 8 *N. Y.*, 37; 29 *Barb.*, 35; 22 *N. Y.*, 258, 494.] (*N. Y. Supreme Ct.*, 1862, *Buffitt v. Troy & Boston R. R. Co.*, 26 *Barb.*, 420).

Where a passenger bought tickets of a railroad agency providing for passage over two separate roads, and after a delay of two months from the time of using one of the tickets commenced his journey over the second road,—*Held*, that the tickets, although printed on the same piece of paper, were distinct contracts and vouchers for separate journeys, as they contained no restrictions; and the validity of the last ticket was unaffected by the delay (*Mich. Supreme Ct.*, 1867, *Brooke v. Grand Trunk R. W. Co.*, 15 *Mich.*, 332).

Where a railroad company sells a through ticket to a passenger, and gives her a through check to transport herself and trunk to a point outside the State, by a specified route, over lines of road belonging to other companies in other States, with a right on the passenger's part to choose by which of two routes she will go from an intermediate point to the terminus,—a re-checking of her trunk at that intermediate point, in consequence of an

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over the Pennsylvania Railroad, and is the authorized Fast Freight Line of that Road, and is worked on all the routes over which it undertakes to transport, under contracts which secure to the property entrusted to its charge, the best facilities for fast and uniform movement that the Roads over which it passes possess.

D. S. GRAY, Gen'l Supt. - - Columbus, Ohio.

Contents and
value of pack-
ages unknown

CINCINNATI, June 27th, 1864.

Received from James B. Grant, the follow-
ing packages, (contents unknown,) in appa-
rent good order, viz. :

MARKS.

M. O.

New York.

Forty Barrels Lard Oil,

Shipped June 25.

Consigned to

Manhattan Oil Co.,

16 Broadway,

New York.

To be forwarded to New York within —— days,
(Sundays excepted,) subject to a forfeiture of five cents
per 100 lbs. for each day over the time specified.

Bill of Lading
from Cincin-
nati to New
York.

Marked and numbered as per margin, to be
transported by the Union Transportation and
Insurance Company, until the said goods or
merchandise shall have reached the point

exercise of that choice, does not constitute a new contract on the part of the company, but that act must be held to have been done in pursuance of the original agreement (*Wis. Supreme Ct.*, 1867, *Candee v. Pennsylvania R. R. Co.*, 21 *Wis.*, 502).

A "through ticket" and baggage-check, imply a special undertaking on the part of the company issuing them, to transport the passenger and his baggage as far as the ticket entitles him to go, whether over the company's road or another; and it is immaterial that there is a change of cars at the terminus of the first road (*Ill. Supreme Ct.*, 1860, *Illinois Central R. R. Co. v. Copeland*, 24 *Ill.*, 332).

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named in this bill of lading, on the following terms and conditions, viz: That the said Union Transportation and Insurance Co. shall not be liable for [*here followed a number of excepted risks*, including] damage or loss by Fire, or other casualty, while in Depots or places of transshipment; * * * * it being also agreed between the parties hereto, that the said Union Transportation and Insurance Co., and the Steamboats, Railroads or Forwarding Lines with which it connects, shall not be held accountable for any deficiency in packages, if receipted at New York, in good order. * * * * And in case of loss or damage to any of the goods named in this Bill of Lading, for which the said Company, or the Railroads, Steamboats, or Forwarding Lines, with which they connect, may be liable for, it is agreed and understood that they shall have the benefit of any insurance effected by, or for account of, the owner of said goods. When losses occur, for which the carriers may be responsible under the Bill of Lading, the cost or value of the property at the date of shipment shall govern the settlement of the same.

In witness whereof, &c.

.....

The Union Transportation Company carried the merchandise in its own cars, in charge of its own employees, over the ordinary railroads in its customary route between Cincinnati and New York, including the railroad of the defendants to South Amboy, in the State of New Jersey, a distance of about twenty miles from New York, and there delivered the merchandise for transportation to New York upon the steamboat "Transport," owned by the defendants, and employed by them as a part of their regular line in the carriage of freight.

The defendants received the merchandise upon their railroad and steamboats for transportation to New York, according to their usual course of business with the Union Transportation and Insurance Company, and upon the understanding and agreement with that company and other carriers who aided in the transportation of the merchandise, that the defendants should collect the entire freight upon the merchandise from Cincinnati to New York, and pay the same over to the Union Transportation and Insurance Company, to be thereafter distributed and apportioned as should be just and equitable.

The defendants landed the merchandise on their pier at New York, after working hours of the day of its arrival; and, before notice was given to the plaintiffs, it was destroyed by fire. The court held at the trial that the defendants were not liable; and gave judgment in their favor, from which the plaintiffs appealed to the court at general term.

Edwards & Odell, for the plaintiffs, appellants.—I. The receipt does not constitute an *agreement* between the company and the shipper. It is *only* a receipt, with *notice* of the terms on which the company is willing to undertake the transportation of the goods (*De Barre v. Livingston*, 48 *Barb.*, 511; *Belger v. Dinsmore*, 34 *How. Pr.*, 421). (1.) The common law liability of a common carrier can only be abridged by *express contract*. (2.) *Notice* of a restricted liability, however distinct, though brought home to the actual knowledge of the shipper, is not sufficient—is not evidence of the shipper's assent—nor can a special agreement be inferred therefrom (*Hollister v. Nowlen*, 19 *Wend.*, 234; *Nevins v. Bay State Co.*, 4 *Bosw.*, 225; *Rawson v. Railroad Co.*, 2 *Abb. Pr. N. S.*, 220; *Dorr v. New Jersey Co.*, 11 *N. Y.* [1 *Kern.*], 485; *Bissell v. R. R. Co.*, 25 *N. Y.*, 442; *F. and M. Bank v. Transportation Co.*, 23 *Vt.*, 186, 205; *York Co. v. Central R. R. Co.*, 3 *Wall. U. S.*, 113; 10 *N. H.*, 487; 10 *Met.*, 479; *Prentice v. Decker*, 49 *Barb.*, 21; *Limburger v. Westcott*, *Id.*, 283; *WOODRUFF, J.*, in *Mercantile Ins.*

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Co. v. Chase, 1 *E. D. Smith*, 138). Whenever a carrier has been released from liability by the terms of a receipt or bill of lading, the evidence has shown "a special contract limiting his liability *at time of acceptance*," or "a notice brought home to the knowledge of the owner of the goods *at the time*, or *before the delivery* of the goods, and assented to by him" (*Redf. on Railways*, 2 ed., 270; cases *supra*; *Moriarty v. Harnden's Express*, 1 *Daly*, 227; *Moore v. Evans*, 14 *Barb.*, 524).

II. There was no such agreement between the Union Express Co. and the plaintiffs in this case, nor can an agreement be implied. The receipt was not issued to plaintiff's agent until June 27, *two days* after delivery of the goods, and probably after they had been sent forward from Cincinnati.

III. The only agreement made by the plaintiffs for the carriage of the oil was made with the Union Company. To that the defendants are not parties. It was not made by their agent, nor by their authority, nor for their benefit, except as hereafter stated; nor does the case show that it came to their possession, or that they had knowledge of it, at any time prior to the commencement of this suit. The Union Company was not the defendant's agent in procuring this oil for transportation, or in contracting with the plaintiffs in reference to it. It was the plaintiffs' agent, entrusted with the plaintiffs' goods, and undertaking to deliver those goods safely at New York (*New Jersey Navigation Co. v. Merchant's Bank*, 6 *How. U. S.*, 344; *Stoddard v. Long Island R. R. Co.*, 5 *Sandf.*, 180). The Union Company *might have* bound the plaintiffs by a special contract with defendants; but no such contract was made. The bill of lading was only intended to define the nature, the terms, and the liabilities of the Union Company's agency.

IV. A receipt, bill of lading, or notice, is construed *strictly* against the carrier, and *liberally* in favor of the shipper; and exceptions are to be taken most strongly against the party for whose benefit they are introduced (*CURTIS, J., in Avery v. Merrill*, 2 *Curt.*, 11). The language

must be taken most strongly against the defendants. The instrument was drawn up with care, in language selected by themselves, and the restrictions were for their benefit. The owners of packages sent by express rarely have an opportunity to examine the terms of the receipt presented to them (SAWYER, J., in *Hooper v. Wells*, 5 *Am. Law Reg. N. S.*, 23, citing Ch. J. GIBSON, in *Atwood v. Trans. Co.*, 9 *Watts*, 83).

V. These general principles aid the construction of this bill. (1.) A carrier may contract to transport goods beyond the terminus of his own route. (2.) He may stipulate for a restricted liability for *himself*, and leave the common law liability of connecting carriers unaffected. (3.) Or he may provide that the qualified liability shall extend to the connecting carriers. (4.) Or that it shall extend to some, fully, or to all, partially, etc.

VI. This bill of lading contains whatever agreement was made by the plaintiffs. It expresses the conditions limiting the liability of the Union Company. It assumes the necessity of the use of "connecting lines," and specifies to what extent the general liability of such "connecting lines" shall be qualified. (1.) *All* the conditions and exemptions are made applicable to the Union Company. (2.) Those that relate to loss or damage in transit; are *confined* to the Union Company in express terms. (3.) A receipt for the oil, in "good order," shall discharge the "connecting lines" from liability for "deficiency in packages." If liable for loss, they "shall have the benefit of any insurance" upon the property destroyed. No further stipulation in their behalf was asked for by the Union Company, or assented to by the plaintiffs.

VII. If the bill of lading had provided that its several provisions should extend to any party who might undertake the carriage of the oil over any portion of the route, the only question would be—Is the loss within any of the exceptions? Or, if it had referred to the Union Company alone, and been silent as to other carriers, it would have afforded a plausible argument in favor of

these defendants. But the terms of the agreement are explicit. The Union Company shall not be liable for leakage, delay, collision or fire. The defendants shall not, in a certain event, be liable for deficiency, and, in case of loss, shall be entitled to insurance held by plaintiffs. Why was *special provision* made for the defendants' indemnity in these *two particulars*, if *all* the stipulations of the agreement were intended to be for their benefit and protection? *Expressio unius*, &c. "Where parties have entered into written agreements with express stipulations, the presumption is, that having expressed *some*, they have expressed *all* the conditions by which they intend to be bound under that instrument" (*Broom's Maxims*, 582, *marg.*).

VIII. The first clause was inserted for the protection of the Union Company only, and intended to be limited to it. It was an Express Company—running over various routes,—owning its own cars, but wholly dependent for motive power upon the companies over whose roads it operated. Its cars could move only as and when *those* carriers chose to move them. Its freight was deposited in places which *those* carriers provided or selected. The time consumed—the means employed—the dangers incurred in the use of those means—in the transit of freight, were alike beyond its regulation or control. Collision and fire were perils to which it was apt to be exposed by the mismanagement or neglect of other parties. It is not strange, therefore, that the Union Company should contract for *its own* exemption from liability as insurers against casualties, which, though not inevitable, it could not even *attempt* to prevent. And it is significant, that the exemption from loss by fire is limited to places where the merchandise would be *least* under the control of the employees of the Union Company, and most exposed to danger.

Charles F. Sanford, for the defendants, respondents.

I. The bill of lading, issued by the Union Transportation and Insurance Company *constituted a special contract*,

by the terms and conditions of which both parties thereto were bound in law. (1.) A carrier may, by *special agreement*, secure exemption from liability not arising from his own fraud, or culpable negligence (*Harris v. Packwood*, 3 *Taunt.*, 264; *N. J. Steam Nav. Co. v. Merchant's Bank*, 6 *How. U. S.*, 382; *Parsons v. Monteath*, 13 *Barb.*, 353; *Moore v. Evans*, 14 *Barb.*, 524; *Dorr v. N. J. Steam Navigation Co.*, 1 *Kern.*, 485; *Wells v. Steam Navigation Co.*, 4 *Seld.*, 375; *Mercantile Mut. Ins. Co. v. Calebs*, 20 *N. Y.*, 173; *Wells v. N. Y. Central R. R. Co.*, 24 *Id.*, 181; *Bissell v. N. Y. Central R. R. Co.*, 25 *Id.*, 442; *Peninsular & Oriental Steam Navigation Co. v. Shand*, 11 *Jur.*, 771). (2.) In all the cases where the questions involved have arisen upon a bill of lading, issued by the carrier, and *accepted by the shipper, concurrently with the delivery of the goods*, such bill of lading has been held to constitute a special contract between carrier and shipper. See *Great N. R. Co. v. Morville* (21 *L. J. R.*, Q. B., 319); *York, &c. R. Co. v. Crisp* (14 *C. B. R.*, 527). The stipulation of the parties, and the findings of the court, recognize and establish *the fact of an "agreement contained in said bill of lading."*

II. The Union Transportation and Insurance Company undertook the transportation of the plaintiffs' merchandise *from the place of shipment to the place where consigned.* (1.) The terms of the contract are explicit; and it is admitted that the carrier undertook the transportation of the plaintiffs' merchandise from Cincinnati to New York. (2.) The contract contains a charge for the carriage of the merchandise to New York. And whenever a carrier agrees to a rate of charge (whether payable at the beginning or end of the journey), for which the goods are to be transported to a particular place, he is, in law, held *as undertaking the carriage of the goods to, and as responsible (subject to the restriction contained in the contract), for their safe delivery at, the place so designated* (*Weed v. Saratoga and Schenectady R. Co.*, 19 *Wend.*, 534; *Merchant's Bank v. Champlain Tr. Co.*, 23 *Vt.*, 186, 209; *Muschamp v. Lancashire and N. S.*—Vol. V.—20.

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Yorkshire R. Co., 8 *M. & W.*, 421; Wilcox v. Parmelee, 3 *Sandf.*, 610; Malloy v. Burrett, 1 *E. D. Smith*, 248; Hart v. Rensselaer & Saratoga R. R. Co., 8 *N. Y. [4 Seld.]*, 37; Krender v. Wilcott, 1 *Hill.*, 223; Dillon v. N. Y. & Erie R. R. Co., *Id.*, 231; Tallent v. South Staffordshire R. Co., 8 *Exch.*, 341; Collins v. Bristol & Exeter R. Co., 25 *L. J. R. [Exch.]*, 185; *Ex. Chamb.* 26 *L. J. R. [Exch.]*, 103; 1 *H. & N.*, 517; *House of Lords*, 29 *L. J. R. [Exch.]*, 41; 7 *House of Lords Cases*, 194; Welby v. West Cornwall R. Co., 27 *L. J. R. [Exch.]*, 181; Mylton v. Midland R. Co., 28 *L. J. R. [Exch.]* 385; 4 *H. & N.*, 615; Coxon v. Great Western R. Co., 29 *L. J. R. [Exch.]*, 165; 5 *H. & N.*, 274).

The bill of lading being a through contract, the defendants, equally with the Union Transportation and Insurance Company, are entitled to all the exceptions and immunities which the contract contains (*Scotthorn v. South Staffordshire Railway Company*, 8 *Exch.*, 341; *Muschamp v. Lancaster R. R. Co.*, 8 *M. & W.*, 421; *Watson v. Ambergate R. R. Co.*, 15 *Jur.*, 448; *Hart v. Rensselaer and Saratoga R. R. Co.*, 4 *Seld.*, 37; *Mallory v. Burrett*, 1 *E. D. Smith*, 234; *Collins v. Bristol and Exeter Railway Company*, 25 *L. J. R. [Exch.]*, 185, and cases *supra*).

By THE COURT.*—MULLIN, J.—The oil, which is the subject-matter of the action, was delivered to the Union Transportation and Insurance Company, at Cincinnati, under a contract between it and the plaintiffs' agent to receive said oil, and carry the same to the city of New York for certain hire and reward in such contract specified.

It was provided in and by said contract that the said Union Transportation and Insurance Company should not be liable for damage or loss by fire or other casualty while said property was in depots or places of transshipment.

The said oil was carried on the cars of said Union

Present, INGRAHAM, P. J., and BARNARD and MULLIN, JJ.

Company over the railroad between Cincinnati and Philadelphia, at which place it was delivered to the defendant to be carried to, and delivered at the city of New York. It was carried over the defendants' railroad to South Amboy, and there put on board a steamboat owned by the defendants, in the usual course of business, and by such vessel carried to New York, and stored in the freight house of said defendants, on Sunday evening, July 10th, and between that and the morning of the 11th of the same month, the said freight house and the said oil were destroyed by fire, without any negligence on the part of the defendants.

No notice of the arrival of said property was given to the plaintiff before the destruction thereof by said fire.

If this action was against the Union Company, it is quite clear that no recovery could be had against it, as this property was, within the exception of the contract, destroyed while in a depot awaiting delivery to the owner. The liability of the carrier was not terminated at the time of the fire. No notice of the arrival of the property had been given; and until that was done the responsibility of the carrier continued.

This being so, the question is whether the defendant was liable for the loss of the property as carrier, wholly irrespective of the contract with the Union Company. The contract with the Union Company provided for the transportation of the oil from Cincinnati to New York, and until the expiration of a reasonable time for its removal after notice to the owner of its arrival. The defendant is not liable on that contract. It was not a party to it.

Upon what principle then, is it liable?

It is said that being a common carrier, and receiving the property as such, to be carried, the law authorizes the owner to elect to pursue it, instead of the company, with which the contract was made. Such a proposition should rest upon the clearest principles or the highest authority. No case has been cited, nor can one be found, establishing any such proposition.

Colburn v. Morton.

The defendant received the goods from the Union Company to be carried, under its contract with the owner, and it was entitled to the benefit of all stipulations in such contract affecting its liability.

As the Union Company would not, on the facts proved, be liable for the property, neither would the defendant. The judgment must therefore be affirmed.

Judgment affirmed.

COLBURN *against* MORTON.

Court of Appeals, January Term, 1867.

APPEAL.—JUDGMENT, AND SUPPLEMENTAL ORDER UPON ACCOUNTING.—TRUST AND TRUSTEE.

In a creditor's action, judgment was rendered setting aside an assignment as void, and directing the assignees to account. A referee was appointed to take the accounting, and, on his report coming in, an order was entered upon his report, requiring defendants to pay to the receiver the sum certified against them on the accounting. No appeal was taken from the first judgment or order, but the defendants appealed from the second one, made upon the accounting, and the supreme court at general term, on considering the appeal, reversed both orders.—*Held*, that on an appeal to the court of appeals the latter court might review the question on the merits whether the defendants were accountable for certain items found against them by the referee,* although this was done in pursuance of the

* In the case of *Morange v. Morris* (*Ct. of Appeals*, 1863, 4 *Abb. Pr. N. S.*, 447), it was held that the usual decree for a sale, in an action to foreclose a mortgage, directing the premises to be sold by the sheriff, and a judgment for any deficiency that may arise to be docketed by the clerk, is, before those proceedings are had, "a final judgment," within the provisions of the Code as to appeals.

A judgment is to be regarded as interlocutory, only when it reserves something for the court judicially to determine.

order or judgment made on the trial of the issues, which had not been appealed from.

A trustee will not be permitted to make profit for himself out of the trust property, and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title; and purchases by a trustee in such cases accrue to the benefit of the trust fund.

This principle applies without reference to the question of the fairness or unfairness of the transaction.

The rule that a trustee cannot purchase the trust property, is to be applied not only in case of valid trusts, but as well on settlements and accountings with trustees or assignees in cases of fraudulent assignments, when adjudged void.

If such trustees hold under the assignment, they are trustees of an express trust to be executed according to the directions of the instrument; but if the assignment be avoided by creditors, the assignees are the trustees for the creditors under an equitable or constructive trust.

The assigned property purchased in by the assignees still belongs to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase.

Assignees of real property for the benefit of creditors are entitled to full indemnity against their expenditures. Even though the assignment is set aside as void, and their claim to have purchased the property for their own benefit is also declared void, they should be protected on the accounting in so far as they acted intentionally for the benefit of the trust, in good faith, and without negligence.

Payments for taking charge of and preserving the trust property, such as for harvesting and saving grain crops, and for the discharge of liens, are within this rule.

If, upon the accounting, they insist on the claim that they purchased the property in their own right, they may be charged with the difference between the amount paid by them on the purchase of the property, and its actual value.

Appeal from a judgment.

The facts appear in the opinions.

Wm. Woodbury, for the plaintiff, appellant.

W. W. Mann, for the defendants, respondents.—I.

The judgment of the general term should be affirmed.

(1.) The formal judgment entered on the report of the referee, Verplanck, was, in fact, an interlocutory order, and, as such, was a proper subject for review. It did not assume to settle the rights of the parties, and was not, in the language of section 245 of the Code "a final determination of the rights of the parties in the action," and,

therefore, it is to be regarded as an order, within the provisions of section 329 of the Code, and subject to review, because it necessarily affects the final judgment. (2.) It was the guide of the referee, Parker, in taking the account.

II. The entry of the formal judgment on the report of the referee, Verplanck, does not change its real character, (1.) Such entry was erroneous because it was not a final determination of the rights of the parties. (2.) It being in effect an order, no formal exceptions were necessary to its review, and, as the conclusions of law are unsupported by the findings of fact, they are subject to review and correction by this court.

III. The respondents were not the trustees of the appellant, and the title which they acquired on the sale of the assigned property, under the execution and chattel mortgage sales, was therefore absolute, and violated no trust. The plaintiff's action was hostile to the assignment and for the purpose of setting it aside; and he thereby repudiated any trust created by the assignment in his favor. Hence no trust can be implied.

IV. In this view, the order of the referee, Verplanck, which held the defendants liable to account to the plaintiff or a receiver for the difference between the value of the property purchased by them and the price paid, and the subsequent proceedings based thereon, was erroneous. The error committed by the referee Parker, under such order, in charging the defendants with the sum of \$535.80, on account of such difference, was therefore properly corrected by the judgment of the supreme court.

V. The defendants acted *bona fide*, and there is no evidence of bad faith on their part. (1.) The accounting ordered was intended to be a legal and equitable one. And on such accounting the defendants acting in good faith were entitled, as allowances, to proper charges and expenses incurred in executing the assignment; and this, although the assignment was declared void (*Hill. on Trustees*, 670, and notes by WHARTON). (2.) The defendants were also entitled to credits for payments made to *bona fide* credit-

ors, in good faith (*Wakeman v. Grover*, 4 *Paige*, 23; *Barney v. Griffin*, 4 *Sandf. Ch.*, 552; S. C., 2 *N. Y.* [2 *Comst.*], 365; *Burr. on Ass.*, 2 ed., 557, 559).

VI. These items should have been allowed the defendants, although the assignment was declared void. (1.) There was no evidence before the referee to dispute the sworn stated account, and the latter, being under oath, was evidence of the facts stated therein. (2.) It was the plaintiff's duty, if he doubted the correctness of the defendants' accounts, to surcharge or falsify them; and, until this was done, they were conclusive. (3.) By requiring the defendants to account under oath, the plaintiff made the accounts, when so rendered, *prima facie* evidence against himself. (4.) The plaintiff, by his judgment, had liberty to surcharge and falsify; and the *onus probandi* always rests upon the party having that liberty (1 *Story Eq. Jur.*, § 525; *Bruen v. Hone*, 2 *Barb.*, 586).

VII. The supreme court properly, therefore, disallowed the sum of \$535.80, recovered against the defendants for the difference between the supposed value of the property bought by the assignees, and the amount bid for the same, and allowed the defendants the sum of \$342.82,—with interest, \$448,—making in the aggregate the sum of \$983.80.

BOCKES, J.—This is an appeal from an order of the general term of the supreme court, reversing the judgment of the special term, entered on the report of a referee, the appellant stipulating that judgment absolute might be entered against him, if the order should be affirmed.

The action was brought by a judgment creditor against his debtor, and the assignees of the latter, to set aside an assignment for fraud, and to have the assigned property and its avails applied in satisfaction of the judgment. The action was referred to Isaac A. Verplanck, as referee, "to hear, try, and determine all the issues and matters set forth in the pleadings."

The referee, having heard the case, decided in favor of

the plaintiff on all the issues made by the pleadings, and directed an accounting by the assignees in regard to the assigned property.

The referee's report was in due form. It contained his findings of fact and conclusions of law ; and judgment was entered thereon at a special term, which declared the rights of the parties as determined by the referee and stated in his report. The report and judgment directed that a receiver should be appointed with the usual rights and powers of receivers in such cases. It also directed the appointment of a referee to take and state the account of the assignees.

No exception was taken to the report of the referee ; nor was any case made showing the evidence or proceedings on the trial before him ; nor was an appeal taken from the judgment or order entered on his report.

At a subsequent special term, an order was entered by consent of parties, referring it to Perry G. Parker, as referee, to take the accounting authorized and directed by the prior decision.

About one year and a half after the entry of this order of reference, Mr. Parker made his report, whereby he found and decided that all the assigned property which came to the possession of the assignees had been disposed of by them, or had been used and appropriated by them, rendering them chargeable with its value, and he certified a balance against Morton and Gaylord, who had received the property and its avails, of \$1,575.90, which sum they were now directed to pay to the receiver. This report was confirmed at special term, and an order was entered thereon directing Morton and Gaylord to pay to the receiver the sum certified against them, with interest, within thirty days, or that execution issue against them therefor. From this order or judgment the defendants Morton and Gaylord appealed to the general term, and the general term, on considering the appeal, reversed both orders, as well the one entered on the report of the second referee, as also that entered on the report of the first. The case made on the appeal contained only the evi-

dence and proceedings before the second referee, Mr. Parker, and, as appears from the order of the general term, the reversal was for errors of law and errors of fact.

(The practice adopted in this case was here discussed at considerable length, and disapproved. But it was considered that the case, as presented, admitted of a review by this court of the principal question touching the merits argued on the appeal; and the opinion proceeded as follows:)

If we unite the two orders—that made on the report of the accounting referee with that made on the report of Mr. Verplanck—we have, in effect, a judgment and decree complete in all its parts; and the appeal will stand, according to the plain intent of the party appealing, as an appeal from a part only of the judgment; an appeal from that part affected by the accounting, as to which only exceptions were taken and a case was made for review.

This is the form in which the case was presented on the appeal to the general term. The order entered on the report of Mr. Verplanck, was the judgment to the extent that it determined the issues made by the pleadings, and was rendered complete by the supplemental order entered on the report of Mr. Parker, both of which should have been combined had the correct practice been adopted.

In this view of the case, the general term was in error in reversing that part of the judgment directed by the decision and report of Mr. Verplanck.

That part had not been appealed from—hence was not before the court for review; nor had exceptions to it been taken; nor had a case been made and settled showing the proceedings before the referee. It is also certified to this court that the reversal by the general term was for errors of law and errors of fact. But it could not be seen that Mr. Verplanck reported erroneously on the facts, for no case was made showing what facts were established before him.

The court could not, therefore, say that his findings

of fact were erroneous. Was Mr. Verplanck in error in his conclusions of law?

If right in my view of the case above expressed, the parties must be held to have acquiesced in his conclusions of law by omitting to enter exceptions or to appeal.

But let it be conceded that the general term had the right to review the decision entered on the report of Mr. Verplanck, and its reversal was manifestly erroneous. The point of error suggested by the general term, as regards Mr. Verplanck's report was, that he held the assignees to account as trustees; notwithstanding the assignment was adjudged fraudulent and void.

It is made to appear from the pleadings, and from the evidence produced before Mr. Parker, that there were liens on portions of the assigned property, by virtue of levies under execution, and by chattel mortgages, at the time the assignment was made.

After the assignment, and on sales under such executions and mortgages, the assignees became purchasers, at sums less than the actual value of the property purchased by them. The referee held and decided, that, in regard to such property, the assignees must account for the difference between the price paid by them on such purchases, and its actual value. This difference was subsequently, on the accounting before Mr. Parker, found to amount in the aggregate to \$535.80.

The ground of such decision was that the assignees claimed to hold this property as their own, relieved from the trust. They so claimed from the first, before the assignment was adjudged void, and while they were insisting on its validity. They put their claim in the record by their answer. They there admit that they claim to hold certain personal property, which formerly belonged to Frye, in their own right, and allege in justification of such claim that, although the property came to their possession by virtue of the assignment, yet at that time it was under levy on execution, and was subject to chattel mortgages, under which it was subsequently sold, and that on such sales they became purchasers.

The claim of absolute ownership was asserted and persisted in until and after judgment was rendered against them ; and the supreme court sustained the claim (ereoneously I think), not on the ground put forward in the answer, but on ground equally untenable, that the assignment being decreed void, they were discharged from all the duties, obligations, and responsibilities which otherwise would have rested on them as trustees, in regard to their purchases of trust property on sales under liens which attached prior to the commencement of the trust. A trustee will not be permitted to make profit for himself out of the trust property ; and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title ; and purchases by a trustee in those cases accrue to the benefit of the trust fund.

It was held in *Jewett v. Miller* (10 *N. Y.* [6 *Seld.*], 402), that one standing as trustee in respect to property in his possession is not permitted to purchase and hold it for his own benefit, although the sale is a judicial one under a title superior to that of the trustee or the *cestui que trust*. It was said by the chancellor in *Van Epps v. Van Epps* (9 *Paige*, 237), that it was a rule of universal application, "that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use." In *Slade v. Van Vechten* (11 *Paige*, 21), it was decided that a trustee who buys in the trust property under a prior incumbrance, and at a price below its real value, is always considered as doing so for the use and benefit of his *cestui que trust*. See also the following cases : *Campbell v. Johnston* (1 *Sandf. Ch.*, 148) ; *Dickinson v. Codwise* (*Id.*, 214) ; *Cram v. Mitchell* (*Id.*, 251) ; *Dobson v. Racey* (3 *Id.*, 60) ; *Iddings v. Bruen* (4 *Id.*, 223, 263) ; *Moore v. Moore* (*Id.*, 37) ; *Bank of Orleans v. Torrey* (7 *Hill*, 260) ; *Hawley v. Cramer* (4 *Cow.*, 717) ; *Torrey v. Bank of Orleans* (9 *Paige*, 649) ; *Conger v. Ring* (11 *Barb.*,

356); 4 *Kent Com.*, 438; *Story Eq. Jur.*, §§ 321, 322, 465; *Will. Eq. Jur.*, 186, 187. The authorities bearing on this subject, both in England and in this country, are collected by DAVIES, J., in *Gardner v. Ogden* (22 *N. Y.*, 327), where the principle which excludes a trustee from all rights to purchase the trust property and hold it for his own benefit, is clearly and emphatically reiterated and affirmed. The trustee will, of course, be indemnified for his advances on a purchase held to be made for the benefit of the beneficiary, and will have a lien on the property purchased for the sum advanced (10 *N. Y.* [6 *Seld.*], 402; 11 *Paige*, 21).

These equitable principles are applied to trustees in regard to their dealings with the trust property in cases of valid trusts, and they should also have application on settlements and accountings with trustees or assignees in cases of fraudulent assignments, when adjudged void. Although the assignment is declared void, the assignees will be protected in so far as they have acted under it in pursuance of its provisions in good faith (*Wakeman v. Grover*, 4 *Paige*, 23; *Ames v. Blunt*, 5 *Id.*, 13; *Averill v. Loucks*, 6 *Barb.*, 470; *Collumb v. Read*, 24 *N. Y.*, 505). They have the benefit of it in their accounting until the fund or property held by them under it is arrested by the creditors' suit, whereby its application is changed by operation of law. A fraudulent assignment is not absolutely void, but void only as to creditors on due application to the court. Neither the assignor nor assignees can be heard to assert its invalidity, and so long as the assigned property and its avails remain in the hands of the assignees, they continue trustees in regard to it.

If not trustees to carry the provisions of the assignment into effect, they are trustees for the creditors, who by their proceedings have acquired the right to control the application of the property. As was well said in the dissenting opinion in this case, when under consideration in the supreme court, "If they hold under the assignment, they are trustees of an express trust to be executed according to the directions of the instrument; but if the

assignment be avoided by creditors, the assignees are trustees for the creditors under an equitable or constructive trust to be executed as the law adjudges through the courts.

“It is impossible for them to escape that relation, and it is by reason of its existence after avoiding the instrument by which they take title from the assignor, that the court either divests them of the property, or orders them to account for what they have received under it.”

The authorities above cited show conclusively that the assigned property purchased in by the assignees still belonged to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase.

When or by what process did the assignees obtain a better title?

It is plain they had none, and it is equally apparent that the creditors by their proceedings acquired a right to the entire fund as it existed in their hands. The action of the creditor, in equity, operated on the trust property, in whatever form and under whatever condition it was held by the trustees, wresting it from the illegal direction given it by the fraudulent instrument, and giving it application as the law required. The assignees should not be allowed to profit by the proceeding; otherwise a temptation would be opened up to them to violate their duty.

If they would be allowed gains in case the assignment should be adjudged void, which they could not have if it continued in force, there would be an inducement offered them to aid in the destruction of the trust. No principle is better settled than this, that trustees cannot be permitted to hold a position hostile to the trust.

They can no more be allowed to make profit by its destruction than by its execution, and consequently cannot hold property discharged from the trust in one case, which would be subjected to it in the other. Again: It has been shown that the assignees were protected by the assignment, while acting under it in good faith. As

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a consequence they should be subjected to the duties, obligations, and responsibilities, which attached to their position. There is no hardship in the application of these rules to a case of accounting by assignees, like the one here under consideration, for under their application assignees are secured full and perfect indemnity. All that is required of them is that they shall surrender and deliver over to the receiver the entire trust property which came to their hands, or its avails, deducting all payments made by them in good faith in performance of the trust, and on being allowed for all labor, expenses, and advances made and incurred in its protection and preservation.

If allowed other and greater rights, they will be permitted to hold gains acquired in their use of the trust funds or resulting from their management of the trust property. The rule which should obtain is well stated by Mr. Justice DAVIES, in his dissenting opinion in this case, that "When the assignment is held invalid as against creditors, the rights and relations of the assignees (except so far as they have in good faith executed the trust) are precisely those that would arise if the property had been delivered to them by the assignor with the express directions to do what the law adjudges they are bound to do ; and hence the rule relating to trustees, and preventing them from acquiring any interest in the property hostile to the beneficiary, and especially their making any speculations upon it, is fully and at all times operative."

It follows from these considerations, that the assignees were properly charged in the accounting with the difference between the amount paid by them on the purchase of the property, and its actual value. They might have relieved themselves from this amount by turning over the property to the receiver, on being paid or allowed the sum advanced on its purchase ; but they elected to hold it as their own discharged from the trust.

They so claimed it in the pleadings, and still so claim it.

They were consequently properly charged with its

value, less the amount paid by them on the purchase. In any view that can be taken of the case, the reversal of the order or judgment entered on the report of the first referee, Mr. Verplanck, was erroneous.

We are now brought to a consideration of the order or judgment of the special term entered on the report of the second referee, Mr. Parker.

An appeal was taken from this order to the general term, where it was reversed.

It is first objected that the reversal was erroneous, because there was no sufficient exception either to the order, or to the report of the referee on which it was founded.

No exception to the order appears on the record, and only very general exceptions to the report of the referee.

But I think the substantial formalities were complied with sufficiently to authorize the general term to examine the case on the merits of the accounting before Mr. Parker.

On such examination it was decided by the general term that several items, amounting in the aggregate to \$535.80, were improperly charged against the defendants; and also that items amounting to \$448.10, were improperly disallowed to them in the accounting, and for these reasons the general term reversed the decision of the special term, unless the plaintiff would stipulate to make what was deemed the proper deduction.

It has already been seen in the previous discussion of the case, that the general term was in error in determining that the items making up the sum of \$535.80 were improperly charged against the defendants. This amount was the aggregate difference between the sums paid by the assignees upon sales of the assigned property, made under executions and chattel mortgages which held priority over the assignment, and its actual value.

The assignees insisted on holding the property as their own, hence were properly chargeable with such difference.

This subject has been above considered, and needs no

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further comment. Besides, the question had been determined by the prior decision in the case, which adjudication was conclusive on the accounting referee, whether right or wrong. The adjudication stood as the law of the case until reversed, and the parties have made it conclusive on them by omitting to appeal. The accounting referee was therefore right in charging the assignees with these items, controlled as he was by the prior decision; and this should be all the more satisfactory, because in accordance with well-settled equitable principles.

The assignees claimed to be allowed for taking charge of and preserving the trust property, as for harvesting and saving the grain crops. Also \$154.10, paid Mr. Allen on a mortgage which was a lien on a portion of the property.

These items amounted to \$448.10 at the date of the referee's report.

The referee refused to allow these items. In this he was in error.

As the case was made before him, they were proper items to be allowed the assignees. They were items of expenditure proper to be allowed, were duly charged and verified in the account, and were not impeached. For aught that appeared before the referee, these items of expenses and payments were incurred and made, necessarily and in good faith, with a view to the preservation and protection of the property, to prevent its loss and sacrifice.

The assignees were entitled to full indemnity against such liabilities and expenditures, and should be protected in the accounting, in so far as they acted intentionally for the benefit of the trust, in good faith, and without negligence. In the absence of anything impugning their fairness, the referee should have allowed those items to the assignees in their accounts.

For this error the case must go back to the accounting referee, unless the plaintiff will consent to reduce the amount reported against the assignees to \$1,127.80, as of the date of the report.

There were a great number of exceptions taken to the rulings of the referee on the hearing, principally in regard to the reception or rejection of evidence, but none of them are of sufficient importance to require comment here.

The order of the general term appealed from should be reversed, without costs of appeal either to the general term or to this court, and the order of the June term, 1859, should be reversed, and the case sent back on the matter of the accounting, to the accounting referee, Mr. Parker, unless the plaintiff, within twenty days after the filing of the remittitur from this court, stipulates to reduce the amount reported against the assignees, Morton and Gaylord, to the sum of \$1,127.80, as of the date of the report ; and in case such stipulation be given, then the order of said special term should be affirmed for the above-mentioned sum, with interest thereon from the date of the report.

All the judges concurred in the above opinion, except GROVER, J., who dissented.

HUNT, J., thought the appeal should be dismissed, but concurred with BOCKES, J., as to the rules of law laid down in the opinion.

DAVIES, Ch. J.—The respondents, together with William W. Mann, were the assignees of one Jesse Frye. The plaintiff, a judgment creditor of Frye, having obtained judgment against him, and an execution issued thereon against him having been duly returned “no property,” instituted this action to set aside said assignment as fraudulent and void as against creditors, and to reach the property of Frye, and have the same applied in payment and satisfaction of his judgment. Such proceedings were had in the supreme court, that said assignment was declared fraudulent and void, and the assignees were directed to account and pay over to a receiver to be appointed, all the property, estate, funds, and effects of the said judgment debtor received by them ; and the said court did further order that said assignees deliver over to such receiver all the property then remaining in their

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hands, received and held by them under said assignment, and the proceeds and avails of so much of the property so received by them as had been by them sold to others, with interest on the same from the time of such sale or sales, and the value of all said property as had been used or converted to the use of them or either of them ; except that they were not to account for so much of said property so received by them, as had been taken and sold on execution and chattel mortgages against said Jesse Frye, and not purchased by them or either of them on such sale or sales.

And it was further ordered and adjudged, that in regard to such of the property so sold on execution and chattel mortgage, that said assignees must account for and pay over to the said receiver the amount of the difference between the price paid on such purchase, and the then actual value of the property so purchased, with interest from the time of such purchase ; and that the said assignees must account for and pay over to the said receiver the value of all property so assigned to them, which had been lost or wasted by their want of care. And a referee was appointed to take and state said account upon the principles mentioned in said order. The referee charged the assignees with the sum of \$535.80, being the difference between the actual value of the property of their assignor, purchased by them, and the price paid by them for the same.

And the referee also refused to allow the assignees certain payments made by them, amounting to the sum of \$448.10. These disbursements were made for expenses of harvesting the crops, and securing the property assigned, and for money paid Orlando Allen upon a mortgage held by him upon a portion of the assigned property. There is no evidence that these payments were not made in good faith.

Judgment was entered up in conformity with the report of the referee, and on appeal to the general term, that court held that the defendants should be credited with said sum of \$448.10, and that the defendants had been improp-

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erly charged with the sum of \$535.80, the difference between the actual value of property of the assignor purchased by them, and the price paid therefor, and ordered a new trial, unless the plaintiff would elect to reduce his judgment to the sum of \$592. This the plaintiff refused to do, and appealed to this court from said order, stipulating that if the same be affirmed, that judgment absolute should be rendered against him.

The only question which the appeal brings up for adjudication is the correctness of the order of the supreme court reversing the judgment of the referee, compelling the assignees to account for and be charged with the difference between the price paid on the purchase of the property of their assignor by them, and the actual value of such property at the time of such purchase by them.

It is to be observed that the plaintiff, by virtue of his judgment and execution, and the lien acquired by the commencement of this action and the setting aside of the assignment of his judgment debtor to these defendants, has succeeded to all the rights of their assignor of, in, or to all the property, funds, and effects of Frye, the judgment debtor. The law is well settled in this State, that one standing in a confidential relation toward the owner of the property, is prohibited from purchasing or dealing with the property of such person (*Gardner v. Ogden*, 22 *N. Y.*, 327, and cases there cited; *McMahon v. Allen*, decided in December, 1866).^{*} In *Fox v. Mackreth* (2 *Bro. Ch.*, 400), it was held by the Master of the Rolls (afterwards Lord KENYON), and by Lord Chancellor THURLOW, that a trustee for the sale of estates for the payment of debts, who purchased them himself by taking undue advantage of the confidence reposed in him by the plaintiff, and who resold the premises at a greatly advanced price, should be regarded as a trustee as to the sums produced by such second sale for the original owner. Nor is it necessary to constitute such liability, that the trustee should be the actor in making the sale. It is the fact of becom-

^{*} Since reported in 35 *N. Y.*, 403, and 3 *Abb. Pr. N. S.*, 74.

ing the purchaser, and thus the owner of the property in reference to which he holds the confidential relation, which the law condemns. In the case of the York Buildings Association v. Mackenzie (8 *Bro. Par. Cas.*, 42), this rule of inhibition was applied with great firmness. The plaintiffs were an insolvent company, and their estate was sold by the order of the court of sessions in Scotland at a public judicial sale, to satisfy creditors. The practice of such sales is, to set up the property at a value fixed upon by the court, which is called the upset price, and which is affixed on information obtained and communicated to the court by the common agent of the court, who has the management of all the outdoor business of the cause. The defendant, Mackenzie, was the common agent, and he purchased for himself at the upset price, he being the only bidder, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for buildings and improvements. There was no question as to the fairness and integrity of the purchase. It was held that Mackenzie was disabled from becoming a purchaser, and he was held to account for the value of the land purchased, after being credited with the amount expended by him for improvements. The English cases are very elaborately reviewed in the case of Aberdeen Railway Co. v. Blaikie (1 *Macq.*, 461), decided in the House of Lords, July 20, 1854. Lord CRANWORTH, in his opinion, says: "Agents have duties to discharge of a fiduciary character toward their principal; and it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the in-

terest of the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal with the estate or interest of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better. But still, so inflexible is the rule, that no inquiry on that subject can be permitted. The English authorities on this head are numerous and uniform.”

The same doctrine received the unequivocal sanction of the court of errors of this State, in *Munro v. Allaire* (2 *Caines' Cas.*, 183). BENSON, J., in delivering the opinion of the court, says: “It is a principle, that a trustee can never be a purchaser; and I assume it as not requiring proof, that the principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase; yet, for the very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed.” Chancellor KENT, in *Davoue v. Fanning* (2 *Johns. Ch.*, 252), says, that he “cannot but notice the precision and accuracy with which the rule and the reason of it are here stated” by Judge BENSON.

Where a purchase has been made in violation of these principles, the *cestui que trust*, or those who may have succeeded to his rights, can either apply to have the sale set aside, or may affirm the sale and charge the purchaser with the actual value of the lands purchased, as was done in the notable case of the *York Buildings Association v. Mackenzie*. So, in the present case, the purchase by these trustees might have been set aside, or it was competent to affirm the same, and charge the trustees with the value of the property purchased by them.

In taking and adjusting the account of the trustees, it was therefore correct in the special term of the supreme court to direct that they must account for and pay over to the receiver in this action, the amount of the difference between the price paid on the purchases made by them of the assigned estate, and the then actual value of the property so purchased, with interest from the time of such purchase. That difference—upon all the authorities—Frye, the assignor, would have been entitled to recover against his trustees; and the receiver in this action was also entitled to the same, for distribution among Frye's creditors. We think the general term erred in requiring the plaintiff to deduct that sum from the amount of the judgment in this action.

We have no doubt that the supreme court properly allowed a credit to the trustees of the sum of \$448.10, for payments made by them in good faith. It is well settled, that on setting aside an assignment accepted by the trustees in good faith, their sales made under it will be ratified, and they will be indemnified in respect of their acts done and payments made in good faith, in pursuance of its provisions (*Barney v. Griffin*, 4 *Sandf. Ch.*, 552; *Young v. Brush*, 28 *N. Y.*, 667, and cases there cited).

The order granting a new trial should therefore be reversed, and the judgment of the court at special term should be affirmed, upon the plaintiff's consenting to deduct therefrom the sum of \$448.10, as of the date of the said judgment.

No costs to either party upon this appeal.

Conditional reversal concurred in by BOCKES, DAVIES, SCRUGHAM, PARKER, and PORTER, J. J.

Judgment reversed conditionally.

PHILLIPS *against* TERRY.*Court of Appeals, January Term, 1867.*

EVIDENCE.—OPINIONS OF WITNESSES.—EXCEPTION.

In an action for damages caused by overflowing the land of the plaintiff, it is competent to ask a surveyor who had made a survey and map of the ground, how much more land would be overflowed at a given height of water. It is also competent to ask the plaintiff how long the water would usually be in going off?

To ascertain the value of a growing crop, damaged by the overflow of water, it is competent to ask a witness, conversant with the growth of such crops, how much, in his opinion, a given field would yield per acre.

A mere objection to such a question, on the ground that it calls for the opinion of the witness, does not avail to sustain an exception on the ground that the witness was not competent as an expert.

Appeal from a judgment.

This was an action of trespass, and was brought by Jerome Phillips against Isaac Terry, to recover damages for injuries done to the crops and herbage growing on the plaintiff's lands, by the overflowing of the waters of a creek caused by obstructions placed therein by the defendant. The injuries complained had extended over several years,—from the spring of 1852, to the first of August, 1858, when the action was commenced.

The answer of the defendant contained a general denial, and set up a right to the obstruction complained of by a prescription, and adverse possession for twenty years.

The action was referred to three referees, who rendered the following report: "The defendant did obstruct wrongfully the Eighteen Mile Creek in the complaint named, and the plaintiff did sustain damages by reason thereof to the amount of fifty dollars." Judgment with costs was given on said report; to which the defendant excepted.

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The case came on for argument on appeal to the general term, and that court ordered the report back to the referees with directions to make a further statement of the facts previously found by them. Upon the coming in of the report, exceptions were taken by the defendant, which are found in the opinion of the court.

The general term of the supreme court disallowed the exceptions, whereupon the defendant appealed to the court of appeals.

Thomas M. Webster, for the plaintiff, respondent.

G. D. Lamont, for the defendant, appellant.

PARKER, J.—In regard to the only conclusion of law found by the referee before whom this action was tried, to wit, that the plaintiff recover of the defendant the sum of fifty dollars and costs, there can be no doubt that it is sustained by the facts found; for the referee found that the creek described in the complaint was obstructed by the defendant in such manner as to cause the water to set back upon the land of the plaintiff to his damage; and that, although after the creek was so obstructed, the controversy between the parties in relation thereto was submitted to arbitration, and the award of the arbitrator made, which settled all damages arising from said obstructions before said award; yet that after the award, by reason of said obstructions, the waters were again caused to set back upon the meadow land of the plaintiff, and upon his growing grass, by which the same was damaged to the amount of fifty dollars.

In regard to the findings of fact, it is enough to say that the exceptions taken to them do not bring up to this court the question whether they are sustained by the evidence or not (14 *N. Y.*, 310; 18 *Id.*, 573; 31 *Id.*, 547).

The defendant upon the trial took some exceptions to the admission of evidence which it is necessary to consider. The witness Haines, who was a surveyor and civil engineer,

had made a survey of the creek, and a map, and had taken levels at various points upon the land of the plaintiff, which was then overflowed and liable to be overflowed at certain stages of the water, and had estimated the distance of these points from each other. His levels were from the surface of the water at a time when the creek was not at its height. He was asked by the plaintiff's counsel, "On these estimated distances, and the levels you took, how much more land would be overflowed with water, if the water was one foot higher?" To this the counsel for the defendant objected, "on the ground that the map does not show where the forest comes to," which objection was overruled, and the witness answered, "ten acres." The ground of the objection, so far as it is made to appear in the case, was no reason for excluding the evidence, which was entirely pertinent and material to the issues, the object being to show how much land would be overflowed at a given height of the water. Even if it had not already been shown that the water had ever reached the proposed height, evidence tending to show that fact was given afterward which would have cured the error if the objection had been placed upon that ground.

The plaintiff himself being a witness, was asked by his counsel, "How long would the water usually be in going off, before the wall was built?" The counsel for the defendant objected on the ground that "the witness must state the fact, and not give such evidence." The witness had stated that, since the wall complained of was built, the water had continued to stand on his land eight or ten days after the rain had ceased, and longer than it had done before. The question, then, was intended to show the comparative effect of the rain upon his land, as to time of continuance, before and after the building of the wall. It called for a fact which was relevant and material, and was entirely proper.

The plaintiff testified, in regard to injury from the water upon his meadow, that in June, 1853, there was high water over about ten acres, when the grass was about a foot

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high, and had just begun to head out. He was asked by his counsel, "Taking that hay as it stood then, what would it yield to the acre?" This was objected to on the ground that it called for the opinion of the witness. I think it was competent to ascertain the fact sought by this inquiry through the opinion of a witness. A person conversant with the growth of grass, and accustomed to compare its appearance in different stages of such growth with its ultimate yield to the acre, may well be said to have such knowledge of that subject as to make him competent to testify how much, in his opinion, a given piece examined by him will yield per acre. The facts on which such an opinion is based, like those on which the value of a given article of property depends, are of such a character as not to be capable of being transferred to the mind of a jury so completely and intelligibly as to enable them to form an adequate determination for themselves (*Clark v. Baird*, 9 *N. Y.* [5 *Seld.*], 183, and cases there cited).

The principle is the same as that on which the opinion of an expert is received. The farmer, acquainted with the subject-matter of such an inquiry as this under consideration, is an expert, and unless the witness has the peculiar knowledge which constitutes him an expert, his opinion would be excluded. Here it was assumed by the plaintiff's counsel, and not denied by the defendant, that the witness was competent, but the objection was that the fact could not be proved by opinion.

The same may be said in regard to the testimony of the witness Labar, to wit: "There should have been one and one-half tons of hay to the acre."

But the testimony of both these witnesses related to damages which accrued prior to the arbitration and award, and the damages found by the referees accrued subsequent to the award. If, then, this evidence was erroneously admitted, no injury can have been produced to the defendant by receiving it, and it furnishes no ground for reversing the judgment.

I am of the opinion that the judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

JOHNSTON *against* BENNETT.

New York Superior Court, Special Term, Dec., 1868.

ASSIGNABILITY OF CAUSE OF ACTION.—DEMURRER.

A cause of action for damages for procuring a sale of goods by false representations, is assignable; and the assignees may sue thereon without joining the assignor.

The case of *Zabriskie v. Smith* (13 N. Y. [3 Kern.], 322), explained and qualified.

Demurrer to complaint.

This action was brought by John T. Johnston and A. Boynton, who averred that the defendants procured the late firm of Dunkle, Johnston & Co. to make a sale of goods to them, by false and fraudulent representations, for which the plaintiffs sought to recover damages. Upon the dissolution of the firm of Dunkle, Johnston & Co. the assets and good will thereof were transferred by assignment to the plaintiffs, who thereupon brought this action.

The defendants interposed a demurrer to the complaint on the grounds: *First*, that there was a defect of parties plaintiff in the omission of Dunkle and Dickey, who were partners in the firm of Dunkle, Johnston & Co., upon whom the deceit was alleged to have been practiced; and, *Second*, that the alleged cause of action was not as-

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signable so as to give the plaintiffs the right to sue in their own names.

Fithian, Clarke & Smith, in support of the demurrer.

B. C. Thayer, opposed.

JONES, J.—The principle laid down in *Haight v. Hayt* (19 N. Y., 464), controls this case; and under it the demurrer must be overruled. The case of *Haight v. Hayt* proceeds, so far as the point involved in the case at bar is concerned, upon sections 1 and 2 of article 1 of title 3 of chapter 8 of part 3 of the revised statutes (See opinion of GROVER, J., at p. 467, and of DENIO, J., at p. 474).

When *Zabriskie v. Smith* (13 N. Y., 322) was decided, these provisions of the statute do not appear to have been called to the attention of the learned judge (DENIO) who delivered the opinion.

Demurrer overruled with costs, with leave to defendants to withdraw demurrer and answer within twenty days; if not, then judgment for plaintiffs with costs.

HARDMAN *against* BOWEN.

Court of Appeals; March Term, 1868.

CONSTRUCTION OF STATUTE.—IMPLICATION.

The statute of 1860 (*Laws of 1860*, 594, ch. 348, § 1),—providing that every assignment of an estate by a debtor, in trust for creditors, shall be in writing, shall be duly acknowledged, and the certificate of acknowledgment indorsed upon such assignment, before delivery thereof to the assignees,—is not merely an affirmative declarative statute. It introduces a new law in regard to assignments and is peremptory, requiring every such assignment to be duly acknowledged and indorsed before delivery. The very language of the statute implies the negative of the right to make an assign-

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ment in any other way,—asserting by implication that *no assignment shall be delivered* without acknowledgment, &c.*

The cases of *Juliand v. Rathbone*, 39 *Barb.*, 97; *Van Vleet v. Slauson*, 45 *Barb.*, 317; *Evans v. Chapin*, 12 *Abb. Pr.*, 161; 20 *How. Pr.*, 289; and *Barbour v. Emerson*, 16 *Abb. Pr.*, 366, examined and explained.

Appeal from a judgment.

This was an action of replevin. The plaintiffs, John Hardman and Daniel Guilfoyle, claimed to make title to the property through an assignment in trust for the benefit of creditors, made by James Sheridan, John Sheridan, and Patrick Sheridan.

The defendant, John B. Bowen, was the sheriff of Broome county, and claimed to hold the property by virtue of a seizure thereof, upon an attachment issued out of the supreme court in favor of one Phelps, and other creditors, against the said Sheridans.

The cause was tried before Justice BALCOM, without a jury, and he found the following facts, to wit:

That the said Sheridans made the said assignment on the 31st December, 1860, the said goods being ininghamton, and that the plaintiffs took possession of the goods on the day the assignment bears date; that they commenced making an inventory of the goods on the first day of January, 1861; that the assignment was not acknowledged by the assignors when it was delivered, but was proved by the subscribing witness thereto, on the third day of January, 1861, and was recorded that day in the office of the clerk of Broome county. That the defendant was the sheriff of Broome county at the date of the assignment, and still is such sheriff. That as such sheriff he took possession of the said goods, on the second day of January, 1861, by virtue of an attachment issued out of the supreme court, bearing date that day, against the property of the said Sheridans, in favor of John J. Phelps and others, who recovered a judgment in the supreme court in the action wherein said attachment

* To similar effect is *Cook v. Kelly*, 14 *Abb. Pr.*, 466; affirming *S. C.*, 12 *Id.*, 35.

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was issued, on the 14th day of February, 1861, for \$880.79 damages, and costs. The goods were worth \$1,200. The goods were replevied and delivered to the plaintiffs.

The judge gave judgment for the defendant for a return of the property, finding the title in him, holding that the assignment had not become operative when the defendant seized the goods on the attachment, because the assignment was neither acknowledged nor proved.

The plaintiffs appealed from the said judgment to the general term, where the judgment was affirmed, and they appealed therefrom to the court of appeals.

George Bartlett, for the plaintiffs, appellants.

Hotchkiss & Seymour, for the defendants, respondents.

MASON, J.—The question presented for adjudication in this case is, whether the delivery of this assignment executed by the Sheridans, but not acknowledged, with the delivery of the possession of the property to the plaintiffs, under the assignment, passed the title to them, so that they can hold it against the defendant's levy on the attachment against the Sheridans, in favor of Phelps and others.

The question depends entirely upon the construction to be put upon the first section of the act of April 13, 1860,—which declares that “Every conveyance or assignment made by a debtor or debtors, of his, her, or their estates, real or personal, or both, in trust, to an assignee or assignees, for the creditors of such debtor or debtors, shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly indorsed upon such conveyance or assignment before the delivery thereof to the assignee or assignees therein named” (*Laws of 1860*, ch. 348).

The argument of appellants' counsel is, that this statute is merely directory, and leaves the former common

law in full force ; and this argument is sought to be maintained upon some quite elementary principles in the construction of statutes. We are referred to DWARRIS, SEDGWICK, and SMITH, on the construction of statutes, for the doctrine that an affirmative statute does not take away the common law.

The rule cannot be denied or questioned at this day, for it has been too well and too long established. The language of Lord COKE, that a statute made in the affirmative, without any negative expressed or implied, does not take the common law, is now elementary (2 *Inst.*, 200 ; *Stafford v. Ingersol*, 3 *Hill*, 41 ; *Clark v. Brown*, 18 *Wend.*, 220 ; *Almy v. Harris*, 5 *Johns.*, 175 ; *Wood v. Chapin*, 13 *N. Y.* [3 *Kern.*], 521, 526 ; *Hall v. Tuttle*, 6 *Hill*, 42 ; *Dwarr. on Stat.*, 638 ; *Smith Com. on Stat. L.*, 771, § 660). The rule has sprung up under the decisions in regard to remedies, and all that is held is, that if the statute gives a new remedy, and is merely affirmative in its terms, without any negative expressed or implied, it does not take away the common law remedy.

The rule has no application to a case like the present. If the legislature were to enact a statute expressly declaring that every conveyance of real estate shall be written or printed on parchment, it cannot be doubted that a deed written on common paper would not answer.

Our present statute says, that every grant in fee, or of a freehold estate, shall be subscribed and sealed by the grantor (1 *Rev. Stat.*, 728, § 137).

There are no negative words, and no declarative words that the deed shall be inoperative if not sealed, and yet it has never been doubted that the seal is essential to give it validity.

The fundamental mistake with the appellant's argument is, in treating this as merely an affirmative declaratory statute. It is no such thing. It introduced a new law in regard to assignments. It required every assignment, whether of real or personal property, to be acknowledged before an officer authorized to take acknowledgments, before delivery, and the certificate of acknowledg-

ment to be indorsed upon the assignment. The language is peremptory—every assignment, &c., shall be acknowledged before delivery. This, as I have already said, introduces a new rule of law in regard to assignments. “It is, as a maxim, generally true, that if an affirmative statute, which is introductive of a new law, direct a thing to be done *in a certain manner*, that thing shall not, even although there are no negative words, be done in any other manner” (*Dwarr. on Stat.*, 641 ; 9 Law Library, O. S. ; *Smith Com. on Stat. L.*, 773, § 665). This statute declares that every assignment in trust for the benefit of creditors, shall be acknowledged before delivery. It is only necessary to say, that no assignment can be delivered without being acknowledged, without violating the plain mandates of this statute, to perceive that this statute itself contains a clear negative against an assignment being made in any other way.

It is very clear to my mind that a negative of the right to make an assignment in any other manner is implied in the very language of the statute, for when the statute declares, in terms, that every assignment shall be acknowledged before delivery, it, by necessary implication, provides that no *assignment shall be delivered* without acknowledgment.

It clearly denies and withholds the right, which before existed, to dispense with the acknowledgment. We are referred to several adjudged cases, holding some of the subsequent sections of this act to be merely directory.

The case of *Juliand v. Rathbone* (39 *Barb.*, 9), holds that the provisions requiring the assignor, within twenty days after the date of an assignment, to make and deliver to the county judge an inventory of his debts and assets, were merely directory as to time, and if made after the expiration of the twenty days, it was good. The case also holds that section 3, requiring the assignee, within thirty days after the date of the assignment, to give a bond for the faithful discharge of his duties, is so far directory that his omission to give it within the thirty days would not invalidate the assignment.

The case was rightly decided, and has been affirmed by several subsequent cases (*Van Vleet v. Slauson*, 45 *Barb.*, 317; *Evans v. Chapin*, 12 *Abb. Pr.*, 161; *S. C.*, 20 *How. Pr.*, 289; *Barbour v. Everson*, 16 *Abb. Pr.*, 366). These cases were well decided, and repose upon the soundest principles of statute construction. The section which requires the assignor, within twenty days, to make out an inventory of his debts and assets, and deliver the same to the county judge, containing no negative words against the exercise of the right to make it afterwards, was held to be merely directory as to time, as the statute was entirely silent as to the effect of the omission to do so.

The same was also held in regard to the omission to give the bond within thirty days.

These cases, however, were also placed upon another ground—that as the assignment was properly executed and duly acknowledged and delivered, and possession of the property taken by the assignees, the title of the property passed, and no omission of the assignor, nor his absolute refusal even to make the inventory within the twenty days, could invalidate the assignment, upon the familiar principle that no acts of the assignor, after the assignment has been executed and delivered, and possession of the property taken by the assignees, or any omission on his part, can invalidate the assignment (4 *Johns. Ch.*, 135; 20 *N. Y.*, 15; 9 *N. Y.* [5 *Seld.*], 141, 152; *Burr. on Assignm.*, 304, 306, 308, 309; 6 *Barb.*, 91, 94; 33 *Id.*, 127, 135; 24 *Id.*, 105; 32 *Id.*, 126; 29 *Id.*, 102; *Burr. on Assignm.*, 442, 3 ed.).

This rule applies with equal force to the assignee, if the assignment was valid in its creation. Having been honestly and properly executed and delivered, no subsequent illegal acts, either of omission or commission, can in any manner invalidate it.

The omission or refusal of the assignee to give the bond which the statute makes it his duty to do, might, perhaps, be treated as a refusal to serve; at any rate, it would furnish good ground for his removal by the court,

and the appointment of a receiver to execute the assignment (9 *N. Y. [5 Seld.]*, 176; 2 *Barb.*, 446; 5 *Paige*, 46; 8 *Id.*, 294; 2 *Story Eq. Jur.*, § 1289; *Burr. on Assignm.*, 507, 568, 2 ed.; *Id.*, 573, 3 ed.; 39 *Barb.*, 101, 102).

The defendant having seized and taken these goods before this assignment was acknowledged, it follows that the assignees could not hold these goods as against these attaching creditors, and that the judgment of the supreme court was right, and should be affirmed.

All the judges concurred in affirming the judgment.

FASNACHT *against* STEHN.

Supreme Court; General Term, January, 1869.

PLEADING.—IRRELEVANT AND REDUNDANT MATTER.— TRIAL BY JUDGE.—WAIVER.

It seems, that section 152 of the code of procedure,—providing that *sham and irrelevant answers* may be stricken out,—does not authorize the striking out the whole or part of an answer as *redundant*. The first clause of section 160 of the Code,—under which irrelevant or *redundant matter* in the pleading may be stricken out,—does not authorize an *entire answer* or an *entire defense* to be stricken out as irrelevant or redundant.

In an action on a foreign judgment, matters of defense alleging fraud in the obtaining of that judgment, even if conceded to be frivolous, cannot be held *irrelevant*, so as to be stricken out under section 152 of the Code.

Where the issue formed by the first defense in an answer, amounts to a plea of *nul tiel record*, it is improper for such issue to be tried by a judge on a motion for judgment; for it is an issue of fact to be tried by a jury.

The circumstance that a defendant excepts to a finding of facts and to conclusions of law by a judge, does not amount to a waiver of a trial by a jury, or estop him, on appeal, from taking the ground that the trial by the judge at chambers was irregular.

Appeal from an order and judgment.

This action was brought on a judgment recovered by the plaintiffs against the defendant, in the sixth district court of New Orleans, Louisiana, on the 19th December, 1863, for \$4,230.10, with interest and costs of suit ; which recovery was by way of counter-claim, or, as it is styled in the civil code of Louisiana, of "demand in reconvention" ; the recovery being in favor of the defendants in that action (the plaintiffs in this), and against the defendant in this action, who was the plaintiff in that.

The complaint averred the recovery and judgment, in due form.

The answer of the defendant sets up three defenses : *First*.—He admits that he commenced the action in New Orleans, and that answers in reconvention were put in ; but he denies that he was duly served with process from the court summoning him to comply with the demand in the answer, and he denies knowledge or information as to the judgment.

Second.—He sets up the facts as he claims them to be, on the merits of the action in Louisiana, and avers that if any such judgment was recovered against him as alleged in the complaint, it was obtained in pursuance of a fraudulent scheme on the part of the plaintiffs, conspiring with one J. H. Pain ; and that by reason of the premises the said supposed judgment is a fraud upon the defendant, and is null and void as against him.

Third.—By way of counter-claim he asks for an injunction, perpetually enjoining the plaintiffs from prosecuting or in any way enforcing against the defendant the judgment mentioned in the complaint.

Thereupon at special term, a motion was made by the plaintiffs, founded on the complaint and answer herein, and on an exemplified copy of the judgment record in the New Orleans action, to strike out the whole answer as *sham and irrelevant*, and for judgment, or that the second and third defenses referred to be stricken out as *irrelevant and redundant* matter.

On the motion the exemplified copy of the New Orleans judgment was read in evidence on the part of the plaintiffs.

No papers were read on the part of the defendant.

The motion was granted, and an order made striking out the said defense as irrelevant and redundant matter, and it was further ordered that said answer, after striking out said irrelevant matter, be stricken out as sham and irrelevant, with costs.

Judgment was afterwards entered, finding, as matters of fact,—the due recovery of the judgment; that the plaintiffs were holders of the same; that the same had never been paid; and, as conclusions of law,—that the plaintiffs are entitled to recover the amount of \$5,314.63, with costs, from the defendant.

From this order and from this judgment the defendant appeals.

James Eschwege and Henry Nicoll, for the defendant, appellant. I.—An answer is never stricken out as sham or irrelevant, except its falsity be undoubted and apparent on the face of the pleading. Where the grounds of an affirmative defense are specially stated under oath, as in this case, the answer will not be stricken out (*People v. McCumber*, 11 *N. Y.* [1 *Kern.*], 320; *McGregor v. McGregor*, 35 *How. Pr.*, 385).

II. So far from the answer in this case being sham or irrelevant, it is submitted that upon the facts, which, for the purposes of this argument, must be taken as true, the judgment which is the subject of this action was recovered by a gross fraud on the part of the plaintiffs and Pain.

III. Relief against fraud, whether in verdicts, decrees, judgments, or other judicial proceedings, is an acknowledged head of equity jurisdiction. Whether fraud has been committed or not, is to be determined by the peculiar circumstances of the individual case (*Jeremy on Eq. Jur.*, 1 Am. ed., 133; 1 *Story Eq. Jur.*, § 252, and cases cited; *People v. Townsend*, 37 *Barb.*, 529; *Michigan v. Phoenix Bank*, 33 *N. Y.*, 9; *Davis v. Tillston*, 6 *How. U. S.*, 114; *Mann v. Worrall*, 16 *Barb.*, 221; *Dobson v. Pearce*, 12 *N. Y.* [2 *Kern.*], 156).

IV.—The question as to the effect to be given to a foreign judgment, has been the subject of much discussion, and while it may now be conceded that, as a general rule, such judgment operates as *res adjudicata* as between parties and privies, it is as well settled that the judgment may always be impeached, by the party against whom it is sought to be enforced, as having been obtained unfairly, or through fraud.

V. The distinction, taken on the argument in the court below, that the only fraud which could be shown must be one outside of the particular question litigated in the action, is without foundation (*Moser v. Polhamus*, 4 *Abb. Pr. N. S.*, 442).

VI. Both the order and judgment should be reversed with costs.

Marsh, Coe & Wallis, for the plaintiffs, respondents.—I. The order striking out the first defense as sham and irrelevant, was properly granted. The defense, after admitting that the action was commenced and that answers in reconvention were put in, as alleged, simply denies *knowledge* or *information* of a judgment having been obtained therein. This was a sham answer. (1.) The denial was insufficient. It is not enough for him to merely deny knowledge or information of a fact, when the truth or falsity of the allegation is within his own knowledge (*Edwards v. Lent*, 8 *How. Pr.*, 28; *Sherman v. New York Central Mills*, 1 *Abb Pr.*, 187; *Wesson v. Judd*, *Id.*, 254; *Thorn v. New York Central Mills*, 10 *How. Pr.*, 19; *Lewers v. Acker*, 11 *Id.*, 37; *Richardson v. Welton*, 4 *Sandf.*, 708; *Hackett v. Pritchard*, 11 *Leg. Obs.*, 315). (2.) The denial of the judgment was false, and therefore sham (*People v. McCumber*, 18 *N. Y.*, 315; *S. C.*, 15 *How. Pr.*, 186; *Clafin v. Griffin*, 8 *Bosw.*, 689; *President, &c. Agawan Bank v. Edgerton*, 10 *Id.*, 669; *Beebe v. Marvin*, 17 *Abb. Pr.*, 194).

II. The order striking out the residue of the answer, to wit, the second and third defenses, as irrelevant and redundant, was correct. The second defense, after aver-

ring the facts as claimed by the defendant, relating to the merits of the New Orleans suit, proceeds to allege that John H. Pain, a witness on the trial of the New Orleans action, falsely testified that Stehn had charged the 100 sacks of coffee to him, the said J. H. Pain, and held him, the said Pain, responsible, from the fact that he had so charged the same in his account current. This is the gist of the second defense. This is palpably no defense, either total or partial, and for various reasons, to wit: The judgment of Louisiana, evidenced by an exemplified transcript of the record, is conclusive upon the parties, and cannot be impeached in the courts of this State while it stands unreversed (*Dobson v. Pearce*, 12 *N. Y.*, 156; *Hatcher v. Rochelau*, 18 *N. Y.*, 86; *Laz-eir v. Wescott*, 26 *N. Y.*, 146). But the evidence of Pain on the trial of the action at New Orleans *was true*, and is so proved to be by the defendant, Stehn, himself.

Even if the defense here set up would be a good ground for opening the judgment, on motion, in Louisiana, or for reversing the same, on appeal, yet it is not available to the defendant *in this action*, and therefore is irrelevant in this action (*Kurtz v. McGuire*, 5 *Duer*, 660; *Stewart v. Bouton*, 1 *Code Rep. N. S.*, 404; *Dovan v. Dinsmore*, 33 *Barb.*, 86; *Herr v. Bamberg*, 10 *How.*, 128; *McGregor v. McGregor*, 35 *How.*, 385, 400).

III. If the first defense was properly struck out as sham, and the second and third defenses were properly stricken out as irrelevant, then it follows that the plaintiffs were entitled to judgment, as if no answer had been put in (*De Forest v. Baker*, 1 *Abb. Pr. N. S.*, 34; *Briggs v. Bergen*, 23 *N. Y.*, 162).

IV. This answer is an obvious attempt to gain time by setting up matters which do not raise any material issue to be tried.

BY THE COURT.—SUTHERLAND, J.—In my opinion both the order and judgment appealed from should be reversed, but without costs.

The action was brought on a Louisiana judgment. The answer of the defendant purported to set up three distinct and separate defenses.

The learned judge at chambers, on motion of the plaintiffs, struck out the whole of the answer, setting up, or undertaking to set up, the second and third defenses, as "redundant and irrelevant matter," leaving the first defense to remain, and then treating that defense as equivalent or amounting to the plea of *nul tiel record*, proceeded at chambers, without a jury, to try that issue, and to find his conclusions of fact, and of law, and ordered judgment for the plaintiffs.

Matter set up as a separate and distinct defense in an answer, must be viewed as a pleading. Under section 152 of the Code, sham and irrelevant answers and defenses may be stricken out; but under this section, neither an entire answer or defense, nor a part of an answer or defenses, can be stricken out as *redundant*.

This section says nothing about redundancy.

Under section 160 of the Code, irrelevant or redundant matter in a pleading may be stricken out; but this section does not authorize an entire answer, or an entire defense in an answer to be stricken out, as irrelevant or redundant. By irrelevant or redundant matter in this section is meant matter impertinently or unnecessarily stated in stating *the cause of action in the complaint or the defense, or a defense in the answer*.

The question is, then, whether the second and third defenses of the defendant's answer should have been stricken out, under section 152 of the Code, as irrelevant.

Now it appears to me impossible to say that the matters set up in these defenses are *irrelevant*. They are certainly relevant to the cause of action stated in the complaint—that is, they relate, or pertain to it.

You might concede that defenses were and are even *frivolous*, but it would not follow that they are irrelevant, by the Code, and by the dictionaries: if an answer or defense is frivolous, it does not follow that it is, or must be *irrelevant*.

I think, therefore, that the order striking out the second and third defenses as redundant and irrelevant was erroneous.

Moreover, I am of the opinion that the trial of the issue formed by the first defense which the learned judge must have treated as being, or as amounting to the plea of *nul tiel record*, was irregular.

The Revised Statutes (2 *Rev. Stat.*, 409, § 4) provided that "all issues of fact joined in any court, proceeding according to the course of common law, shall be tried by a jury, except where a reference shall be ordered."

In *Trotter v. Mills* (6 *Wend.*, 512), the supreme court of this State held that the issue formed by the plea of *nul tiel record* was an issue of fact within this provision of the Revised Statutes, and was to be tried by a jury.

I cannot discover that the Code has changed the manner of trial of such an issue of fact, or taken away the right of the defendant to have such an issue tried by a jury (*Code*, § 253.)

He could waive his right of a trial by jury (*Code*, §§ 253, 266), but I cannot discover in the case any ground for saying that he did waive it.

He had notice of the motion to strike out, and for judgment, but I cannot discover that he had notice of the trial.

I do not think that the circumstances that the defendant excepted to the finding of fact, and to conclusions of law, can be regarded as a waiver of a trial by jury, or as estopping him from taking the ground on this appeal, that the trial by the judge at chambers was irregular. Besides, if the order striking out, &c., is reversed, as I think it should be, the judgment must fall with it.

Both the order and judgment should be reversed without costs, irrespective of the question whether the matters set up in the second and third defenses, or either, are, or are not a defense to the action.

GROSVENOR *against* THE NEW YORK CENTRAL RAILROAD COMPANY.*Court of Appeals, March Term, 1868.*

COMMON CARRIER.—DELIVERY.—ESTOPPEL

In order to maintain an action against a common carrier for injuries to goods entrusted to him for transportation, it must be established that the property was *actually delivered* to him, by being placed in such a position that it might be taken care of by the carrier or his agent having charge of the business, and under his immediate control. To show that such agent was notified, does not make out a valid acceptance and delivery. The place of delivery is important, and due care must be used to leave the property where it is not exposed to danger.*

It seems, that if a principal sanctions the performance of a duty by persons in his employment other than the one who is actually the agent having charge of that particular department, having thus held out to the world that they are authorized agents, he cannot relieve himself from responsibility by repudiating their acts.

Appeal from a judgment.

* That proprietors of a railroad are liable as common carriers, for goods received by them for transportation, though not yet laden,—see *Fitchburg & Worcester R. R. Co. v. Hanna*, 6 *Gray*, 539. But the commencement of the liability is upon their receipt of the goods. *Id.*

Roadside deposits made to save trouble of hauling to depot are at risk of the owners until put on a car; and no action can be maintained against a company for loss of such deposits, notwithstanding a conductor of a freight train had promised to stop and take them. *Wells v. Wilmington R. R. Co.*, 6 *Jones Law (N. C.)*, 47.

Where goods delivered by their owner to a railroad company at their station house, for transportation, were consumed by fire there,—*Held*, that a general notice by the company, known to the plaintiff at the time of delivering the goods, that all goods would be kept at the risk of the owner while in the defendants' warehouse, did not preclude the owner from recovering against the company. *Moses v. Boston & Maine R. R. Co.*, 4 *Fost.*, 71; 32 *N. H.*, 523.

Grosvenor v. New York Central R. R. Co.

The complaint in this action alleged that in April, 1861, the plaintiff, Seth B. Grosvenor, delivered to the defendant, at Clinton Springs, a cutter, to be carried by it to Buffalo, and paid the defendant therefor, which the defendant agreed to do, and that, by the negligence of the defendant, it became wholly lost to the plaintiff.

The answer denied these allegations.

The issue was tried in the superior court of Buffalo, before Justice CLINTON and a jury, when the following facts were proved :—

That the plaintiff called upon the defendant's depot agent at Clifton, and paid him the freight on the cutter, and the fare of his servant to Buffalo, and told him that he would send them down in the morning, to go by the afternoon train.

The servant brought the cutter, by plaintiff's directions, to have it shipped to Buffalo, and arrived at the depot about six o'clock in the morning, and placed it on the platform of the freight-house, next to the railroad track, with one end next the freight-house, and the other end towards the track, and went back after the thills ; he returned in about an hour with them, and stopped in front of the passenger depot, about six rods from the freight-house, and saw the defendant's baggage-man, one Hall, who, at the time, was sweeping out the depot, and said to him, "There is some stuff to go to Buffalo." He asked on what train ; to which he replied, "the one o'clock," and then took the thills and laid them with the cutter. He had not then seen the baggage-man do anything with the freight, and did not ask for or take any receipt for the property. One Sutherland was the defendant's agent there, and had been such agent for three years, and was alone authorized to receive and deliver freight, and resided in the depot. Hall was the baggage-man, and had never received freight, or given receipts therefor, except by his especial directions, and had no general orders on that subject. *The freight is always received and delivered at the east end of the freight-house.* The track runs east and west. There is a plat-

form alongside of the freight-house, next the track, and comes within a few inches of a freight car on the track, which is used for receiving and delivering freight from and to the cars, when it is taken into or from the freight-house and weighed ; and *it is received from and delivered at the east end of the depot.*

It was also proved that the cutter, where left by plaintiff's servant, could not be seen from the passenger depot. That the cutter, placed on the platform, as stated, *would project over it nine inches.* That two or three hours afterwards a car in a passing train caught the cutter and broke it, and the first knowledge the agent had of its being there was seeing it pass his office at the passenger depot on this car, broken. That it was the invariable custom for the shipper to mark property and its destination before the defendant received it, when he weighed it and ascertained the freight. And that the plaintiff's servant did mark a box, which he brought with the cutter in the afternoon, before shipment, and said he wanted it to go to Buffalo.

At the close of the plaintiff's testimony, and at the close of the evidence, the defendant made a motion for a nonsuit upon this ground—that upon the undisputed facts the plaintiff was not entitled to recover ; which motion was denied by the court, and an exception taken to the decision by the defendant.

The jury found a verdict for the plaintiff for \$78.16, for which judgment, with costs, was entered.

The defendant appealed to the general term of that court, where the judgment was affirmed.

The defendant thereupon appealed to this court.

A. P. Laning, for the defendant, appellant.

J. H. Reynolds, for the plaintiff, respondent.

MILLER, J.—I am of the opinion that the court erred in refusing to nonsuit the plaintiff upon the trial.

To render a party liable as a common carrier, it must

be established that the property was actually delivered to the common carrier, or to some person duly authorized to act on his behalf.

The responsibility of the carrier does not commence until the delivery is complete (*Angell on Carr.*, § 129; *Story on Bailm.*, § 532).

It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person (*Packard v. Getman*, 6 *Cow.*, 757; *Tower v. U. & S. R. R. Co.*, 7 *Hill*, 47; *Blanchard v. Isaacs*, 3 *Barb.*, 388; 2 *Kent Com.*, 604; 2 *Parsons on Cont.*, 654). The liability of the carrier attaches only from the time of the acceptance of the goods by him (*Story on Bailm.*, § 533; 6 *Cow.*, *supra*). To complete the delivery of the property within the rules laid down in the authorities, I think it is also essential that the property should be placed in such a position that it may be taken care of by the agent or person having charge of the business, and under his immediate control. It must be accepted and received by the agent.

It appears in the case at bar, that the cutter of the plaintiff was placed upon the platform of the defendant's freight-house, by a servant of the plaintiff (the freight having been previously paid) to be transported to Buffalo.

At the time when it was thus left, a baggage-man in the defendant's employment, who was then engaged in sweeping out the depot, was notified that there was some freight to go to Buffalo in the noon train. The servant of the plaintiff testifies that he had seen this person receive and put freight on the cars, and at this time he apparently had charge of the depot, although the proof on the part of the defendant shows that another employee was the real freight-agent, and the person with whom the contract was made for the carriage of the property, and that the baggage-man had no authority to receive it.

Upon this state of facts I am inclined to think that the plaintiff had established sufficient, *prima facie*, to submit to the jury the question, whether the baggage-man

was authorized to receive the property, and whether the notice to him was of itself sufficient.

Persons dealing with railroad corporations and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it have ample authority to deal with them.

It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation ; and even although it subsequently appears that another employee was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts. So far, then, as this branch of the case is concerned, it was, at least, a question of fact, to be submitted to the jury, under proper instructions, whether the baggage-man of the defendant, to whom, it is claimed by the plaintiff, the cutter was delivered, was the agent of the defendant duly authorized to receive the same, and whether notice of its delivery was given to him as such agent.

But whether he was such agent, or the duty of receiving freight devolved upon another person, the defendant could not be held liable, under any circumstances, without an actual and complete delivery of the property into the possession of the corporation, and under its control. This, I think, was not done.

The undisputed testimony shows that the cutter was placed upon the platform, and that, within two or three hours afterwards, it was carried away and broken to pieces by a passing train of cars. The fact that it was thus carried away evinces that it was carelessly exposed by the plaintiff's servant ; that the destruction of the cutter was occasioned by his negligence, and that the delivery was not as perfect and complete as it should have been.

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The accident would not have happened had the cutter been placed beyond the reach of passing trains.

It was not enough that the agent was notified, to make out a valid acceptance and delivery.

The place of delivery was important, and it was equally essential that due care should be exercised.

Suppose the servant had left the cutter on the track of the railroad, and notified the agents, would the defendant have been responsible? Clearly not, for the apparent reason that there was no delivery upon the premises—no surrender of the property into the possession of the agent.

Until it was actually delivered, the agent was actually under no obligation to take charge of the property, even if notified.

It is apparent that the plaintiff was in fault in not delivering the property to the defendant, and in leaving it in an exposed condition, which caused its destruction; and having failed to establish this material part of his case he should have been nonsuited.

As a new trial must be granted, for the error stated, it is not important to examine the other questions raised and discussed.

All the judges concurred in reversing the judgment.

Judgment reversed, and new trial granted, with costs to abide the event.

EMERSON *against* BLEAKLEY.

Court of Appeals; March Term, 1867.

CAUSE OF ACTION.—ABATEMENT.—PARTIES.—WAIVER.
—TESTIMONY OF DECEASED WITNESS.—AMENDING VERDICT.

An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff, for the tortious taking of

*Decided
61 Nov. 1880
Relied on, 88 N. Y. 72
2nd ed. 8th Nov. 1880*

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assets, does not abate by the death of the plaintiff. The cause of action survives by virtue of 2 *Rev. Stat.*, 447.*

The proper parties to be substituted, in such a case, are the personal representatives of the deceased trustee, since the action relates to personal property.†

But, if a successor in the trust is appointed, and he is substituted as plaintiff in the action upon the consent of the defendant, the defendant cannot afterwards avail himself of the objection that the action is not properly prosecuted by him as plaintiff.

The rule that the testimony given on a former trial, by a witness since deceased, is admissible in evidence, is applicable to the testimony given by a party to the action.

In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail.—*Held*, that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict.

Appeal from a judgment.

This action was brought by Jesse M. Emerson, successor of Robert Grant, deceased, assignee of William Montgomery (plaintiff and respondent), against William Bleakley, Jr., Sheriff, &c. (defendant and appellant).

On or about Dec. 17, 1859, one Alfred Booth obtained a judgment in the supreme court, in Westchester county, against William Montgomery and William Garabrant for \$2,268.33 on two promissory notes made by them as "Montgomery & Co."

On the 20th of the same month, 1859, Booth caused execution thereon against the property of Montgomery and Garabrant, to be issued to the defendant in this suit, Bleakley, then sheriff of Westchester county.

On Oct. 20, 1857, a stock company had been organized by William Montgomery and four others, by the title of the "New York Steam Saw-mill and Machine Company."

On the next day, one day after the date of the certifi-

* See, also, *Johnston v. Bennett*, ante, 331.

† Compare *Bunn v. Vaughan*, ante, 269.

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cate of incorporation of the company, William Montgomery and one Lund (who had become a partner of Montgomery in the place of Garabrant), for the consideration of \$100,000, made a bill of sale of "all the materials, good-will, and appurtenances of whatever kind or nature appertaining and belonging to the manufacturing and machine business heretofore conducted under the name of William Montgomery & Co.," together with the full right to the immediate occupancy of the premises in which said property was contained, &c., to the said New York Steam Saw-mill and Machine Company.

On the same day Montgomery and Lund executed another bill of sale to said Steam Saw-mill and Machine Company, for consideration of \$15,000, "of all the steam saw-mills, steam-engines, boilers, machinery, and stock of all kinds manufacturing, or in process of manufacturing, appertaining to and belonging to the engine and machine manufacturing department of the business heretofore conducted under the name of Messrs. Montgomery & Co., together with all the belongings thereto," &c.

Montgomery became the president of this machine company on its organization, and always continued such president, and had the management and direction of its business.

Montgomery & Co. had a lease of the factory premises for five years from May 1, 1855, which passed to the machine company under the bill of sale first above mentioned.

On the 23rd day of December, 1858, an agreement was entered into between Montgomery and certain others of the stockholders of the said machine company, by which said Montgomery was to become possessed of their stock on certain conditions, which it is claimed were never performed by Montgomery.

Montgomery, the 29th day of November, 1859, executed a general assignment for the benefit of his individual creditors, to Robert Grant, "of all the estate and property, real and personal, of him, the said William Montgomery, either individually, or as a member of the

late firm of Montgomery & Co., or a corporator or stockholder of the New York Steam Saw-mill and Machine Company.”

Under this assignment Grant claimed title to the property in question. And as the defendant, as sheriff, had in the first instance levied upon said property, under the said execution of Booth, against Montgomery and Garabrant, this action of replevin was brought by Grant.

On a former trial of the cause the plaintiff recovered judgment for the full amount of his claim, after the entry of which he died. Subsequently Montgomery, the assignor, applied to the court by petition for the appointment of a successor in the trust, which the court granted by the appointment of Emerson, the present plaintiff. The court also granted an order substituting Emerson in the place of Grant as plaintiff in this action. Both these orders were made upon the written consent of defendant.*

* The petitions, consents, and orders, were in the following form :—

To the Justices of the Supreme Court of the State of New York :

The petition of William Montgomery, of the county of Westchester, respectfully represents :

That on the 29th day of November, 1859, at the city of New York, your petitioner executed and delivered to one Robert Grant, then of Westchester county, merchant, doing business in the city of New York, a general assignment for the benefit of his creditors. That said assignee accepted the trusts contained in said assignment, and entered upon and continued in the duties thereof until the 28th day of September last, when he died, to wit, at Yonkers, in said county of Westchester. The said assigned estate consists at present of a judgment recovered in the name of said assignee against William Bleakley, Jr., sheriff of the county of Westchester, for the sum of \$26,475.10, and docketed in said county of Westchester on the 10th day of September, 1861, and claims now in litigation in behalf of said assignee.

That an appeal is about to be taken from the judgment aforesaid, as your petitioner is informed and believes, and that there is now no person to represent said estate, or to execute the duties of said trust.

Your petitioner represents that Jesse M. Emerson, of the city of New York, publisher, is a proper person to be charged with the execution of said trusts, under the direction of the court, as the successor of the said Robert Grant, deceased, and your petitioner prays that he may be appointed thereto accordingly. And your petitioner will ever pray, &c.

[*Verification.*]

[*Signature.*]

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Emerson being thus substituted as the successor in trust and as the plaintiff in the action, the defendant appealed from the judgment which Grant had recovered, the result of which appeal was that a new trial was ordered.

On the trial, the jury found that the stock and mate-

I consent to execute the trusts contained in the above-mentioned assignment of William Montgomery.

JESSE M. EMERSON.

[TITLE OF THE CAUSE.]

We approve of and consent to the appointment of Jesse M. Emerson, above-named, to execute the trusts contained in the above-mentioned assignment of William Montgomery.

[Signatures of] Attorneys for Defendant.

At a special term of the supreme court of the State of New York, held at the court-house in the county of Queens, on the 23rd day of October, 1861,

Present—Hon. WM. W. SCRUGHAM, *Justice*.

[TITLE OF THE CAUSE.]

On reading and filing the stipulation and written consent of the parties to this action, whereby it appears that Robert Grant, the plaintiff, suing as assignee of William Montgomery in this action, is deceased, and that Jesse M. Emerson, of the city of New York, has been duly appointed, by the order of the court duly entered, to execute the duties of this trust contained in said assignment, and consenting the said Emerson to be substituted for the said Grant as plaintiff in this action,

On motion of S. E. Church, plaintiff's attorney, it is Ordered, that said Jesse M. Emerson be, and he hereby is, substituted for and in the place of said Grant, as plaintiff in this action.

[Signature of] Clerk.

[TITLE OF THE CAUSE.]

Robert Grant, the plaintiff, suing as assignee of William Montgomery in this action, having deceased since judgment entered thereon, and Jesse M. Emerson, of the city of New York, having been duly appointed by the order of the court as the successor to said Grant in the execution of the trusts contained in said judgment, and an appeal being about to be taken from the said judgment, we do hereby consent that said Emerson be substituted for said Grant as plaintiff in this action.

[Signatures of Attorneys.]

[Date.]

rials belonged to Robert Grant, valuing the same at \$13,233.81; and that the tools and fixtures belonged to the Steam Saw-mill and Machine Company, valuing the same at \$13,158.

Upon the coming in of the verdict, the court directed the complaint of the plaintiff to be amended so as to conform to the evidence, by designating the portion of the property found for the plaintiff by the jury, and described by them as "stock and materials," and by designating also the portion found for the defendant, which the jury had described as "tools and fixtures." The amendment was made by inserting at the end of the list of articles in the complaint, an enumeration of those which were known as "tools and fixtures," and a statement that the residue of the property was known as "stock and materials." This amendment was made against the objection of the defendant's counsel.

Judgment was entered in conformity with the verdict, and was affirmed by the supreme court at general term in the second district.

R. W. Van Pelt, for the defendant, appellant.—I. It is claimed on the part of the appellant, that the reversal of the former judgment, by the court of appeals, restored the case, in every respect, to its condition before the plaintiff had any verdict whatever; for a verdict that is set aside is no verdict (*Burkle v. Luce*, 1 *Comst.*, 156). The action, being replevin, purely a personal action, therefore, abated by the death of the plaintiff, as he died before verdict, and it could not be revived or continued. This was well settled law before the Code (2 *Rev. Stat.*, 576, § 2; *Id.*, 386-7, §§ 2, 3; *Webber v. Underhill*, 19 *Wend.*, 44; *Cutfield v. Corney*, 2 *Wils.*, 83). Section 121 of the Code declares that "no action shall abate by the death, or marriage, or other disability of a party, or by the transfer of any interest therein, *if the cause of action survive or continue.*" The complaint is for a wrongful detention of the property by the defendant from the plaintiff *Grant*, and Grant could only maintain the action

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on showing a wrongful taking or detention from *himself*. If the defendant in this case had died instead of the plaintiff, it would not for one moment be pretended that the action could be continued, and a personal judgment recovered against his executor or administrator, founded on the wrongful act of the deceased (*Hopkins v. Adams*, 5 *Abb. Pr.*, 361). In an action for the recovery of personal property, a demand and refusal are necessary where the defendant becomes possessed of the property by the delivery of the wrong-doer, and merely detains it; and this is applicable to a defendant in possession who is assignee of the wrong-doer in trust for creditors (*Fuller v. Lewis*, 13 *How. Pr.*, 219). If the action would have abated by reason of the death of the defendant before verdict, the same rule would apply in case of the death of the plaintiff. The defendant has not wrongfully taken, nor does he wrongfully detain, the property in question from *Emerson the successor* of Grant; and upon what principle could he be entitled, in case of success, to a personal judgment against Emerson, "for the return of the property or for the value thereof, in case a return cannot be had, and the damages for taking and withholding the same,"—which is the only judgment that can be recovered in replevin (*Dwight v. Enos*, 9 *N. Y.* [5 *Seld.*], 470; *Seaman v. Luce*, 23 *Barb.*, 240). The assignment of personal property after conversion does not authorize the assignee to recover without a demand by and refusal as to him (*Hall v. Robinson*, 2 *N. Y.* [2 *Comst.*], 293; 5 *N. Y.* [1 *Seld.*], 344; 1 *E. D. Smith*, 522). It may be claimed that the clause in section 121 of the Code, that "after a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law," applies to the present case; and because there has once been a verdict, the action does not abate. But clearly this applies to cases, only, in which the verdict shall be retained, and this was the law before the Code. But, however this clause may be construed, no personal judgment could be rendered

against the representatives, for the action must thereafter proceed in the same manner as in cases where the cause of action now survives by law ; and not the executors or administrators, but only the assets of the deceased remaining in their hands, are liable. It may also be insisted, that as Grant claimed title under an assignment for the benefit of creditors, he was the trustee of an express trust, and that the action did not abate, for the reason that the *trust survived*. But Grant did not sue as trustee or assignee. The complaint shows that he brought the action in his own name and right, and thus he became entitled to all the rights, and subject to all the liabilities of ordinary parties.

II. The motion for a dismissal of the complaint, on the ground "that it appears by the plaintiff's evidence that the title to the property was in the personal representatives of Grant, according to the terms of the assignment," should have been granted. The assignment transferred and conveyed the property, *real and personal*, to the said Robert Grant, *his heirs, executors, administrators, and assignees forever*, in trust, &c. The simple order appointing him trustee, did not transfer the title from the legal representatives of Grant, and vest in him. On Grant's death, the title vested by operation of law in his legal representatives ; by the very terms of the instrument that gave him title, those representatives would have the right to execute the trust, for the *cestui que trust* had accepted the assignment with this provision in it, and the court could not interpose and remove or supersede them by appointing another successor without cause. Grant had recovered the judgment appealed from in his own name, and on his death it vested in his personal representatives, and not in his successor in the trust (*Renaud v. Conselyea*, 3 *Abb. Pr.*, 346 ; S. C., 4 *Id.*, 280). On the reversal of the judgment, by the express provisions of the assignment, the claim, or the property for which the judgment had been recovered, passed to his representative.

III. The judgment of the court of appeals not only re-

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versed the prior judgment of Grant, but also reversed and vacated all subsequent orders and proceedings founded upon that judgment, including the orders and proceedings appointing Emerson successor, &c., and therefore it was error to receive them in evidence under defendant's objection and exceptions—they were no longer operative. The Code provides that every action shall be prosecuted by the real party in interest, and the evidence on the part of the plaintiff not only does not show any right, title, or interest in Emerson, but it expressly shows it out of him.

IV. If the action survives, and the order appointing Emerson successor is still operative, and vested the title in him, then it was error to receive the testimony of Grant, the former plaintiff, given on his trial, for the reason that the defendant was not entitled to be sworn as a witness in his own behalf, after Emerson was substituted as plaintiff, as Emerson derived his title directly from Grant. If the living are not permitted to testify against the dead, surely the dead should not be permitted to testify against the living. Section 399 of the Code does not authorize the testimony of a deceased party to be read on a new trial. Independent of this section, the right to do so cannot even be claimed. And see amendment of Code, May 4, 1863. It was also error to receive the declarations of Grant to Montgomery, in respect to completing the order in hand.

V. The motion for the nonsuit on the ground that the plaintiff was not the owner of the property, nor Grant at any time ; and also that it was incompetent for Montgomery to make any transfer of the subject of his trust while acting as president of the machine company, should have been granted. And the verdict for the plaintiff for the portion of the property specified in it as stock and material, is contrary to, and unsupported by the evidence, and in utter disregard of the charge of the judge.

VI. It was error to allow the question put to Lund, in reference to his delivering to, and leaving in the possession of Montgomery, the property in question, on the

ground that it was not competent for witness to deliver the property to any one, as he had only a shareholder's interest.

VII. The court erred in excluding the evidence offered by the defendant to show that he made a levy upon the property in suit, as sheriff of Westchester county, under an execution issued to him on a judgment duly recovered, and that said levy was in full force and effect. Surely if it was competent to show the title out of the plaintiff Grant, in the machine company, it was also competent to show that the defendant as sheriff held the property in suit under a levy against the real owner, whether taken before or after suit.

VIII. Under the charge of the judge, it was the imperative duty of the jury to render a verdict for the defendant as to all the property in question; instead of doing so, they assumed to divide the property, the title to which was a unit, between the plaintiff and the defendant. Their verdict is manifestly wrong, and should have been set aside by the court below.

IX. The justice who wrote the opinion at general term, is in error in supposing that the testimony in relation to the stock and material was substantially different from that in relation to the tools and fixtures. If Montgomery had not the power to acquire the title to the property of the machine company, without the authority or direction of the trustees of said company, and while acting as president of said company, and if there is no evidence that the trustees of said machine company ever transferred or authorized a transfer of said property to Montgomery, how could he possibly become the owner of the stock and materials of said machine company?

X. The verdict does not separate and specify, or sufficiently describe, the property intended to be given to either plaintiff or defendant, and for this is bad. It is a mistrial. The special verdict should find every fact necessary to enable the court to order judgment (*Manning v. Monaghan*, 23 *N. Y.*, 539; *Cobb v. Cornish*, 16 *Id.*, 602; *Gilbert v. Beach*, *Id.*, 606).

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XI. The affidavit of Grant states the actual value of the property selected out by the plaintiff at \$3,000. The verdict is excessive.

XII. The judge erred in refusing to charge the first proposition.

XIII. The judge erred in refusing to charge the tenth proposition (*Ackerman v. Emott*, 4 *Barb.*, 626; *Tuny v. Bank of Orleans*, 7 *Hill*, 260; *Dobson v. Racey*, 3 *Sandf. Ch.*, 60).

S. E. Church, for the plaintiff, respondent. I. The action did not abate by the death of Robert Grant. Being prosecuted by the plaintiff in a *representative capacity* as a *trustee*, it was saved from abatement by the operation of the law as it stood before the Code (amendment of 1857), and as it now stands independently of that amendment. In contemplation of law, trustees and persons prosecuting an action in a representative capacity never die. It is the *trust*, and not the *trustee*, that constitutes the real party (2 *Rev. Stat.*, 5 ed., 19, § 53; *Id.*, 22, § 87; *Id.*, 213, § 14; *Id.*, 670, § 14; *Id.*, 777, § 113; 2 *Den.*, 125). It cannot be said that the plaintiff (Grant) in this case was not a "*trustee*" within p. 670, § 14, as not being appointed "by virtue of any statute." For he is appointed by virtue of the statutes authorizing assignments for the benefit of creditors, and the statutes of uses and trusts. And see Code, § 113 (4 *Abb. Pr.*, 106; 3 *Rev. Stat.*, 5 ed., § 87, *et seq.*). But independently of the general law, the abatement was prevented by the operation of the amended Code of 1857 (*Code*, § 121, subd. 2; amendment 1857, § 101). The action has not abated, because being put regularly in court by the orders of substitution of October 23, 1861, it was there for all the purposes of a full litigation, as in other actions, and no death has since occurred to abate it. If there were any irregularities in the orders of October 23, 1861, they are conclusive until set aside (29 *Barb.*, 664; 18 *How. Pr.*, 112).

II. The remaining questions in the case arise upon the

defendant's exceptions, and are of but little importance. Grant's testimony was properly read: he was a witness as well as a party (2 *Johns.*, 17; 11 *Id.*, 28; 12 *Wend.*, 41). The complaint was properly amended to conform to the verdict or the proofs (*Code*, § 173). The defendant did not object to the *form* of the amendment, and the amendment was clearly proper. The judgment should be affirmed with damages for the delay.

HUNT, J.—The appellant claims a reversal of the judgment below, on the ground that this being an action of replevin, for a tortious taking of the property in question by the defendant from the possession of Grant, the action abated by the death of Grant, in whom the right of action existed. Grant died a year and a half before the trial occurred on which the present judgment was rendered; and the claim involves the invalidity of all the proceedings subsequent to his death. The appellant also claims that the existence of a verdict in favor of Grant, at the time of his death, places the plaintiff in no better situation, for the reason that that verdict was afterwards set aside by the court of appeals; and a verdict set aside, it is claimed, is, in law, as if there had been no verdict. The appellant insists that upon the death of Grant, the trust estate conveyed to him by the assignment of Montgomery, descended to his personal representatives, and that this action should be brought by them, if by any one, and not by a newly appointed trustee. These suggestions involve separate considerations, which will be more readily appreciated by a separate examination of the propositions.

First. Did the action of Grant, for the tortious taking and conversion of this large amount of property, abate by his death, in the sense that all claim for compensation was thereby ended? If this action had been to recover damages for an assault and battery or a libel of which he had been the subject, upon his death before verdict, all right to damages, in any form or by any party, would have ceased. The maxim "*actio personalis mori-*

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tur cum persona," applies to such a case. In the present case a debtor in failing circumstances had conveyed to Grant a large amount of personal property, upon the trust and direction that he should apply the proceeds of the same in the payment of certain specified debts. The defendant, as sheriff, seizes the same upon an execution against the insolvent debtor, and removes the same from the possession of Grant. The assignee, Grant, brings an action to recover damages for such removal, but before trial he dies. The rule in such case is provided by statute (2 *Rev. Stat.*, 447, § 1): "For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrong-doer, and after his death, against his executors and administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts." It is further provided by section 121 of the Code, that "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue." Being a claim for wrongs done to the property of Grant, and it being clear, therefore, that the cause of action survived the death of Grant, the right to damages did not cease with his life.

Second. It is said, however, by the appellants, that this cause of action vested in Grant's executors, and not in a new trustee to be appointed by the court; and this is the second question in the case. I understand the law to be, that personal estate held in trust, upon the death of the trustee descends to, and the title vests in, the personal representatives of the trustee, and that the provisions of the statute giving the title to a trustee to be appointed by the court, apply to trusts in real estate only (1 *Rev. Stat.*, 730, § 68; *Savage v. Burnham*, 17 *N. Y.*, 561; *Kane v. Gott*, 24 *Wend.*, 641; *Bunn v. Vaughan*, *ante*, 269). The parties, however, have made the law for themselves in the present case, by their stipulation of

Oct. 20, 1862. This stipulation is signed by the appellants' attorneys; recites that Grant sued as the assignee of Montgomery; that he died since judgment had been entered; that Emerson had been appointed his successor in the execution of the trusts contained in the assignment, and that an appeal was about to be taken from the judgment, and concludes thus: "We do hereby consent that the said Emerson be substituted for said Grant in this action." This binds the appellants as completely as if they had stipulated that Emerson was Grant's executor, and that the action should proceed without further delay. They agree, in substance, that Emerson is the proper person to prosecute Grant's rights under the assignment, and consent that he may do so as plaintiff in the present action. If the general rule of law is as claimed by the appellants, it is evident that the present action is properly prosecuted. This view of the case renders it necessary to consider the effect of the first verdict, the vacating the same, and the rendering of a second verdict in favor of the plaintiff.

There are several minor questions presented upon the appellants' brief, which have been carefully considered, and no reason for disturbing the judgment is perceived. The questions of fact were of a doubtful character, but having been determined by the jury, we are not at liberty to interfere with them. Neither do questions of practice or regularity properly come under consideration in cases like the present. The most of the questions of law were ruled as requested by the appellant. If any injustice has been suffered by them, it was at the hands of the jury, for which we can give no redress.

The judgment should be affirmed.

PARKER, J.—I think there was no abatement of the action by the death of Grant, the original plaintiff. The cause of action survived by virtue of the statute (2 *Rev. Stat.*, 447, § 1, 1st ed.; *Webster v. Underhill*, 19 *Wend.*, 447); and this being so, section 121 of the Code saves the action from abatement.

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Although Grant held the property in question as a *trustee*, on his death it passed, under the common law, to his personal representatives, who were bound to execute the trust (*De Peyster v. Ferrers*, 11 *Paige*, 13). We held in the case of *Bunn v. Vaughan*, decided at the last term of this court, that section 68 of the article of the revised statutes relative to uses and trusts (1 *Rev. Stat.*, 730, 1st ed.), does not relate to personal property, and that the common law rule above referred to still exists and applies in reference to such property. The consequence is, that on the death of Grant, the title to the property passed to his legal representatives, who, unless they had transferred it to Emerson, should have been substituted. But the appointment, by the court, of Emerson to execute the trusts of the assignment, and his substitution as plaintiff in the action, having both been made by the express consent and stipulation of the defendant, set forth in the case, I am inclined to think his motion for a dismissal of the complaint upon the trial, on the ground that the title to the property was in the personal representatives of Grant, was properly denied. *Non constat* that the cause of action had not passed by assignment from the personal representatives of Grant to Emerson. In that case he was the proper person to be substituted; and, I think, as against the defendant, under his stipulations, such assignment should be presumed.

The other grounds on which the nonsuit was claimed, to wit, that Grant was not the owner of the property when the suit was brought, and that it was incompetent for Montgomery to make any transfer to himself, were also properly regarded as not well taken—the first as involving a question of fact for the jury, and the other as not covering the whole of the plaintiff's claim.

The objection to the introduction of Grant's testimony on the former trial, was properly overruled. It was but the common case of reproducing the testimony of a deceased witness. I see nothing in the objection that he was a party. He was also a witness, and therefore

within the rule allowing proof of what he testified to be given. The inquiry of the witness Montgomery, whether he received any directions from Grant in regard to the property, immediately after the delivery of the assignment, was relevant and proper as part of the *res gestæ*. The question to the same witness, as to what was done with moneys, which he had stated were realized from a portion of the assigned property, was also properly allowed.

I see no error in the rulings in regard to the questions put to the witness Lund as to his delivery, when he left, of the stock, &c., at the machine shop, to Montgomery, and as to his ever again exercising any acts of ownership over the property. This was clearly pertinent to the question which was litigated, whether Montgomery owned the property, or any part of it.

The offer of the defendant to prove that the sheriff of Westchester levied upon the property in question, as the property of the Steam Saw-mill and Machine Company, after this suit was brought, was wholly irrelevant and immaterial, and was properly excluded.

The court was requested to charge "that if the sheriff (defendant) found Montgomery in the actual possession of the property levied on under the Booth execution, the plaintiff must prove a demand of said property and refusal to surrender it before he could recover," which was refused. If the property belonged to the plaintiff, the taking it out of the possession of Montgomery—who was the plaintiff's agent, using it in the plaintiff's business—in hostility to the plaintiff's right to it, was a wrongful taking as against the plaintiff (*Clark v. Skinner*, 20 *Johns.*, 465), and no demand was necessary (*Cummings v. Vorce*, 3 *Hill*, 282; *Dunham v. Wyckoff*, 3 *Wend.*, 280). The request was therefore properly refused.

As to the defendant's request to charge that Montgomery, while acting as president of the machine company, could not become the purchaser of its property if objected to by any stockholder or creditor of the company, there was nothing in the evidence calling for such instruction

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to the jury, nor for anything more on that subject than the court had already said to them ; for they had already been instructed that, as to all that portion of the property in question which had been transferred to the machine company, and which had been acquired by said company, the title to it remained in the company at the time of the assignment, and did not pass to Grant, and that Montgomery's interest in such property at the time of the assignment was a stockholder's interest only, and that only such interest passed by the assignment, so that the additional instruction requested was entirely nugatory.

The complaint now made by the plaintiff's counsel, that under the charge of the court it was the duty of the jury to render a verdict for the defendant as to all the property in question, and that the court below should, on that ground, have set aside the verdict, is not one which this court can listen to or redress. The case is not open to us for an examination of the facts.

The finding by the jury that Grant was the owner of that portion of the property in question described as *stock and materials*, and not of that described as *tools and fixtures*, rendered necessary a more specific description of the two classes. This the court ordered to be made by directing the complaint to be amended so as to conform to the evidence, and to designate the portion of the property found for the plaintiff, described as "stock and materials," and the portion found for the defendant, described as "tools and fixtures," to which the counsel for the defendant excepted ; and thereupon the plaintiff did amend the complaint by inserting at the end of the list of articles a list of those which he denominated "*tools and fixtures*," and stated that the residue of said property was known as "stock and materials." No fault was found with the manner in which the distribution was made and the amendment carried out.

I think it was competent for the court to amend the verdict, as was in effect done, for the purpose not of adding or subtracting, but specifying in accordance with the

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evidence, as was done in this case (*Sleght v. Hartshorne*, 1 *Johns.*, 149; 1 *Sell. Pr.*, 480; 1 *Archb. Pr.*, 215; 2 *Id.*, 275).

Upon the whole case, I am of the opinion that the judgment should be affirmed.

Judgment affirmed.

LARREAU *against* DAVIGNON.

Superior Court of Buffalo; General Term, Dec., 1866.

RIGHT OF ALIENS TO HOLD LANDS.—DOWER.—INHERITANCE.—ACT OF 1845.

An alien may take land by grant, and hold it at the will of the State. The State cannot enter upon his possession until the alienism and escheat have been judicially established.

By the common law, lands held by an alien on his death vest in the State. Otherwise, when a citizen holding lands liable to escheat dies.

The statutes enabling certain aliens to hold lands apply to descents from those only who are resident *aliens* at the time of their death; and therefore they confer the right of dower on the *alien* widow of an *alien* purchaser, and deny it to the *alien* widow of the *native* born and *naturalized* citizen. They authorize resident aliens to transmit lands to alien heirs, and deny it to the citizen.

L., being a resident alien, purchased and took a conveyance of certain lands, and died in the possession of them. After the purchase, he became a citizen by naturalization. At the time of his death, he had an *alien* sister living, who had two children born in and citizens of this State. He had also a second cousin who was a naturalized citizen. All the ancestors of the second cousin, through whom said second cousin traced consanguinity to L., had died before L.—*Held*, that the second cousin inherited L.'s lands; that the children of L.'s sister could not inherit, by reason of the alienism of their mother.

The statute of 1845 authorized resident aliens to transmit lands to alien heirs, and did not authorize citizens to do so; and L. was not a "deceased alien," but a deceased citizen.

Appeal from a judgment.

Larreau v. Davignon.

This was an action of ejectment brought by Joseph Larreau against Clemence Davignon and others, and was tried before Justice CLINTON and a jury. Both parties claim under one Andrew N. Larreau. Andrew N. Larreau was an alien by birth. He resided in the city of Buffalo for many years prior to 1845, and continued to up to the time of his death, which occurred in May, 1865. The lands in question were conveyed to him in 1845. In 1847, he declared his intention to become a citizen of the United States, and in 1852 he was naturalized a citizen. His sister, the defendant, Clemence Davignon, who is an alien, and her husband, lived in Buffalo from the early part of 1855 until in 1861, when they moved to Canada, and resided there until the death of Andrew N. Larreau, when they returned with their children to Buffalo, and took possession of the lands in question. They have two children born in the city of Buffalo while they resided there, viz: Nelson, about ten years old, and Phœbe, about seven years old. Andrew N. Larreau had a second cousin, Edward Larreau, who resided in the State of Illinois, and who became a citizen of the United States by naturalization in 1859. The three, Nelson and Phœbe Davignon, and Edward Larreau, were the only relatives of Andrew who were citizens of the United States.

He had a large number of alien relatives residing out of the United States, viz: a sister, Mrs. Davignon, three brothers, and uncles, nephews, and cousins. Edward Larreau, for a comparatively small consideration, conveyed his interest in the lands of which Andrew N. died seized, to the plaintiff. The judge directed a verdict for the plaintiff. The defendants appealed.

B. H. Austin and *J. L. Talcott*, for defendants, appellants.

E. C. Sprague, for plaintiff, respondent.

BY THE COURT.*—MASTEN, J.—From the case, it

* Present, CLINTON, MASTEN, and VERPLANK, JJ.

would seem that the land in question may be recovered by the State as an escheat. At the time it was conveyed to Andrew N. Larreau he was an alien. By subsequently becoming a naturalized citizen of the United States he probably did not defeat the right of the State.

It does not appear that he ever made and filed in the office of the secretary of this State, the deposition required by the statute. But being a citizen at the time of his death, that question does not affect the plaintiff's right to maintain this action.

An alien may take land by grant, and hold it at the will of the State. The State cannot enter upon his possession until the alienism and escheat have been judicially established. His possession and holding being lawful, can only be terminated by the State, and by it only by judicial proceedings.

Land held by an alien, instantly upon his death, without inquest of office escheats and vests by the common law in the State, because the freehold cannot be kept in abeyance, and the alien was incompetent to transmit it by hereditary descent. But where a citizen holds land liable to escheat, and dies, the land does not, as in the case of an alien, vest immediately upon his death in the State; for, being competent to transmit land by descent, if his heirs enter upon it, their possession is, like his, lawful until the State by judicial proceedings establishes the escheat (*Jackson v. Adams*, 7 *Wend.*, 367; *Wright v. Saddler*, 20 *N. Y.*, 320).

The law of descent in this State embraces and makes no distinction between the *native born* and the *naturalized* citizen. Who are entitled to inherit must be determined by the law and the facts existing at the time of the death of the intestate.

Andrew N. Larreau, at the time of his death, had a large number of non-resident alien relatives by blood, to wit: one sister (the defendant, Mrs. Davignon), three brothers, and several uncles, nephews, and cousins. He had three relatives by blood who were citizens of the United States, viz: Edward Larreau, the plaintiff's

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grantor, who was his second cousin, and Nelson and Phœbe Davignon, children of his sister, Mrs. Davignon. All the persons through whom the said Edward had to trace his consanguinity with Andrew N. Larreau, were aliens, and died prior to the death of said Andrew.

Prior to 1830, neither of the above-mentioned citizens could have taken by inheritance from Andrew L. Larreau, because a title by descent could not be deduced through a person who was without heritable blood.

By the Revised Statutes it is enacted that no person capable of inheriting under the provisions of the statute shall be precluded from such inheritance by reason of the alienism of any *ancestor* of such person.

By the settled judicial construction of this provision of the statute, Edward Larreau is within it, and enabled to inherit, for all the aliens through whom he must deduce his title, were dead at the time of the death of Andrew N. Larreau. And Nelson and Phœbe are not within the statute, because the alien (their mother) through whom they are compelled to deduce title is living (*McLean v. Swanton*, 13 *N. Y.* [3 *Kern.*], 535).

The learned counsel of the defendant pressed upon our consideration, as applicable to this case, and as enabling Mrs. Davignon to take the land in question from her brother Andrew, the fourth section of chapter 115 of the laws of 1845, entitled "An act to enable resident aliens to hold and convey real estate, and for other purposes." This section is certainly very liberal towards certain aliens, by enabling them to transmit and to take lands by descent.

As has already been remarked, an alien, at the common law, was incompetent to transmit lands by hereditary descent, and therefore immediately upon his death the lands held by him escheated to and vested in the State. If an alien father holding lands died, leaving a citizen son, the descent by reason of the inability of the father, was not cast upon the son, but the lands escheated to the State.

By the section under consideration, a resident alien is

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enabled to transmit by descent the lands held by him at the time of his death. The section nowhere gives to aliens generally the power to transmit lands by descent ; by the clear and express terms of the section, that power is only granted to resident aliens, and in respect to lands acquired by purchase and held by such alien at the time of his death. The section declares who may take such lands from such alien by descent.

It defines the persons "*who may take and hold as heirs of such deceased alien,*" and it places aliens and citizens upon the same footing.

It makes, in the particular case mentioned, alien blood equally heritable with citizen blood.

It, in brief, provides, that lands acquired by purchase and held by a resident alien at the time of his death, shall descend to those persons, whether aliens or citizens, who would, under the statute of descent, take them if the deceased and all such persons at the time of his death had been citizens. Now, the alien relatives of Andrew N. Larreau are not within this fourth section, and are not by force of it entitled to take by descent the lands of which he died possessed ; because he was not at the time of his death *an alien*, but was a *naturalized citizen*.

It was urged that he was a resident alien at the time he purchased and took a conveyance of the land in question. That does not satisfy the act. To come within the provisions of this fourth section he must be an alien at his death, "*a deceased alien.*"

It was said that if Andrew N. Larreau had not become a citizen of the United States, the descent of the land in question would have been cast upon his brothers and sister, and that great injustice will be done if this fourth section is not so construed that their expectations shall not be defeated by William Larreau's becoming a citizen of the United States. This argument assumes that the act under consideration takes away rights, which is not the fact ; it is an enabling act, and grants rights in the case specified. The descent of the land, if changed, is not changed by the statute under consideration, but

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by the act of Mr. Larreau subsequent to the passage of the statute.

But if Mr. Larreau had not become a citizen but had died a *resident alien*, it is not clear that the descent would have been cast upon his brothers and sister, for they were all *non-resident* aliens.

It is a question not free from doubt, and we do not intend to pass upon it, whether the fourth section of the act of 1845, enables *non-resident* aliens to take by descent.

The words are sufficient: but the title and general provisions of the act indicate to some extent that the object of the act is not to overturn the general policy of the government that aliens shall not take lands by descent, but to carry out that policy which encourages immigration by enabling aliens who come here to assume allegiance to the government, to hold lands while they are qualifying themselves for admission to citizenship, and to transmit them to those relatives who have come here for the like purpose. The course of legislation in respect to aliens has not always been consistent with justice and sound policy.

It has conferred the right of dower on the *resident alien widow* of an *alien* purchaser and denied it to the *resident alien* widow of the *native* born and of the *naturalized citizen* (*Mick v. Mick*, 10 *Wend.*, 379; *Connolly v. Smith*, 21 *Id.*, 59; *Currin v. Finn*, 3 *Den.*, 229).

It has authorized resident aliens to transmit lands to alien heirs, and denied it to the citizen.

The judgment is affirmed.

TANNER *against* PARSHALL.*Court of Appeals; March Term, 1867.*

EVIDENCE.—ADMISSIBILITY OF ACCOUNTS.—ADMISSIONS.

In an action in which the question is whether a certain transaction was a sale of property, or a delivery to the defendant as agent of the plaintiff, it is competent to prove an entry made by the plaintiff, in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness.

Upon such a question, the jury cannot consider the actual value or the unsoundness of the property, as a circumstance in connection with the price, bearing upon the question.

Appeal from a judgment.

This action was brought by Perry G. Tanner, plaintiff and respondent, against Anson C. Parshall, defendant and appellant, to recover the price of a horse alleged to have been sold and delivered to the defendant in Sept., 1856. The cause was tried the second time at the Otsego circuit, in June, 1860.

The principal question litigated on the trial, was whether the horse was sold to the defendant for \$500, or whether he was delivered to the defendant to be taken to New York, by one Baird, and sold on plaintiff's account; and on this question the testimony of the plaintiff and defendant was directly in conflict, and, with other evidence more or less bearing upon the truth of the version of either party, was submitted to the jury, who found for the plaintiff.

On the trial, the plaintiff, under the objection and exception of the defendant, was permitted to show that on the same day that he claimed to have sold the horse to the defendant, he went to his store, and in the absence of the defendant, made an entry in his book of accounts, charging defendant with the horse, at \$500, and that he

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subsequently exhibited this entry to the defendant, who admitted its accuracy. The judge allowed the entry to be read to the jury, and charged that it was a circumstance tending to prove the alleged sale. The principal question in the case was, whether this evidence was properly admitted.

John H. Reynolds, for the defendant, appellant.—I. Evidence was given of the fact that immediately after the alleged sale of the horse to the defendant, the plaintiff went to his store and made an entry of the sale on his book of accounts; and the justice charged that “if the plaintiff made a memorandum or entry of the sale immediately after he got down to the store, it would be a circumstance tending to show the alleged sale.” This was manifest error. (1.) The entry was not made in the presence of the defendant, and was no part of the *res gestæ*; it was at a different time from that of the sale, and a different transaction (*Erben v. Lorillard*, 19 *N. Y.*, 300; *Young v. State*, 28 *Pa. St.*, 501; 1 *Greenl. Ev.*, § 108). (2.) It was not intended as a memorandum to refresh the recollection of the witness; there was no pretended failure of recollection as to the sale, the date, or the amount, or in respect to any thing connected with it. It was given in evidence and put to the jury as an independent fact tending to prove a sale (*Brown v. Jones*, 46 *Barb.*, 400). (3.) It was nothing more than the plaintiff’s declaration in his own favor; and nothing can be clearer than that the declarations of a party, after the transaction has closed, and the parties thereto have separated, are not admissible in favor of the parties making them (*Ogden v. Peters*, 15 *Barb.*, 560). (4.) Entries made by a person, even in the course of his duty or employment, are inadmissible as evidence in his own favor (*Doe v. Whitefoot*, 8 *Car. & P.*, 270; *Meysick v. Wackley*, *Id.*, 283; 8 *Ad. & El.*, 175). (5.) The fact that the plaintiffs charged goods in their books as sold to the defendant, is not admissible on the issue whether the sale was made to him or to another (*Smith v. Anderson*, 7 *Mann. Gr. &*

Scott, 21, 31 ; 1 *Smith Lead. Cas.*, 413 ; *Leighton v. Foster*, 11 *Fost.*, 119). (6.) The plaintiff's letter to the defendant in case of an alleged sale is inadmissible (*Jacoby v. Laussatt*, 6 *Serg. & R.*, 300). (7.) The statement of a complainant immediately after an alleged robbery, is not admissible in evidence, though proved by another (*People v. Finnegan*, 1 *Park. Cr.*, 147). (8.) Nor is the declaration of the holder of a check, on coming out of a bank, that he had demanded payment, admissible to prove a demand (*Bruce v. Lark*, 4 *Yerg.*, 210 ; *Lund v. Inhabitants*, 9 *Cush.*, 42). (9.) Nor is the statement of a person of the terms of a transaction, immediately after a negotiation, on going into the next room, admissible in evidence (*Smith v. Webb*, 1 *Barb.*, 231 ; *Draper v. Weld*, 13 *Gray*, 580 ; *Carter v. Gregory*, 8 *Pick.*, 165 ; *Robb v. Hackly*, 23 *Wend.*, 50). (10.) A party cannot make evidence for himself, by making a written statement of a transaction ; and this entry was not admissible for the purpose of corroborating the statements of the plaintiff as witness. Evidence of such a character, for such a purpose, is not now received (*Robb v. Hackly*, 23 *Wend.*, 50, 55 ; *Dudley v. Bolles*, 24 *Id.*, 465, 472 ; *People v. Finnegan*, 1 *Park. Cr.*, 147 ; *Smith v. Stickney*, 17 *Barb.*, 489 ; 1 *Greenl. Ev.*, § 469 ; *Conrad v. Griffing*, 11 *How. U. S.*, 480). (11.) The court below admitted the evidence in question, for the reason that the plaintiff, as he testified, afterwards exhibited the entry to the defendant ; but the jury were charged to the effect that the making of the entry by the plaintiff was a fact tending to show the alleged sale. The charge did not put it on the ground of its being afterwards shown to the defendant, with proof that he promised to pay the charge.

II. Evidence was given, tending to show that at the time of the alleged sale of the horse to the defendant, he was lame, unsound, with many apparent defects, and was not worth even \$150 or \$200. And the judge charged the jury that in determining the fact whether there was a sale of the horse at \$500 or not, they had no right to take into consideration the actual value or the unsoundness of

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the horse as a circumstance bearing on that question. (1.) This was error. In cases like the present, where the evidence is contradictory and closely balanced, the evidence referred to is proper to be considered by the jury. (2.) If the horse was unsound, apparently lame, and not worth more than \$150, it is improbable that the defendant would have paid the alleged price for him, without even exacting a warranty. It was a circumstance tending to show the improbability of the plaintiff's story.

III. The daughter of the plaintiff testified that on the day of the alleged sale, the plaintiff said to her, in the presence of the defendant, "I have sold Billy." And it was error to say to the jury that this tended to prove the fact of a sale, because the defendant did not deny it. The defendant was not called upon to say anything. It does not appear that he knew who "Billy" was, or to what the plaintiff referred. The judgment should be reversed, and a new trial granted.

L. J. Burditt, for the plaintiff, and respondent.

HUNT, J.—This case was eminently one for the jury. We have nothing to do with the decision. We accept it as the correct determination of the disputed facts before them. The legal proposition before us is quite simple. We are not called upon to decide whether the entry by the plaintiff of the sale of the horse to the defendant, in the plaintiff's book, was a part of the *res gestæ*, nor are we to decide whether the entry alone would have been competent evidence. Here the offer to read the entry was accompanied by the offer, also, to prove that the entry was subsequently read to the defendant, and that he admitted its correctness. That a statement by the plaintiff to the defendant, whether verbal or written, charging the latter with the purchase of a horse, at the agreed price of \$500, which statement was then assented to by the defendant, is competent evidence against the latter, would seem to be too plain a proposition for discussion. The offer, as made, was proved, and was corroborated by the

defendant, so far as that he admitted that the statement was read over to him. He denied that he admitted its correctness, or promised to pay it.

The charge to the jury was upon the same subject-matter, and in reference to the whole of the same. I think there could have been no misleading of the jury, and no misunderstanding by them of the questions before them.

The judge further charged the jury that in determining whether the defendant bought the horse, and agreed to pay \$500 for him, they had no right to take into consideration the actual value, or the unsoundness of the horse, as a circumstance bearing on that question. If the jury had been engaged in deciding whether the defendant had made a good bargain in purchasing the horse, such evidence would have been material. So if there had been inquiry whether there had been a breach of an alleged warranty of soundness, the evidence referred to would have been important. But it was entirely immaterial upon the question whether the defendant had purchased the horse, or had received him from the plaintiff to sell on his account. As a legal proposition it could have no tendency to establish either a sale or an agency. There was no error in the instruction to the jury.

Neither was there any error in this instruction : that if the defendant heard the remark which the plaintiff's daughter testified that the father made to her, "that he had sold Billy," and did not deny it, it was competent evidence. The presence of the parties there, and the taking away of the horse by the defendant, would justify the jury in applying the remark to the horse in question.

The judgment should be affirmed.

GROVER, J. (dissenting).—No question was made but that the testimony of the plaintiff, that he read the entry on his book charging the horse to the defendant, at five hundred dollars, and that the latter promised to pay it, was competent. But did this render competent the addi-

tional testimony of the plaintiff, that he made the entry immediately after the alleged sale. The case shows that this latter testimony was used as independent evidence of a sale of the horse by the plaintiff to the defendant. It appears from the charge that the jury were told by the learned justice, that if the plaintiff made a memorandum or entry of the sale immediately after he got down to the store, it would be a circumstance tending to show the alleged sale. The question is whether the evidence was competent for this purpose. If it was, the charge was correct. If not, the reception of the evidence, and the charge, were erroneous. The only point in issue was whether the defendant purchased the horse of the plaintiff. Upon this point the evidence was conflicting. The inquiry is whether reading the entry or charge to the defendant a long time afterward, and his promise to pay the amount, rendered testimony that the entry was made by plaintiff immediately after his arrival at the store, after the alleged sale, competent evidence of such sale. The testimony of the defendant denying such promise, and that he emphatically repudiated the claim, can have no bearing upon the question. It was for the jury to determine as to the credibility of the witnesses, and the duty of the judge, in deciding upon the competency of evidence, to regard the testimony of each as possibly true. It is an elementary principle that a party cannot give his own acts or declarations in evidence in his own favor, unless a part of the *res gestæ*. Making the charge was no part of the transaction between the parties, and not, therefore, admissible upon that ground. How can the alleged promise of payment by the defendant make the time when the charge was made by plaintiff, or the fact that it was made by him, admissible evidence against the defendant? What the defendant had the right of proving was, what occurred between the parties at the time the entry was made, and this as an admission of the defendant. This could not make any other evidence competent, unless necessary to explain the admission which that admission referred to, and which the circum-

stances showed was referred to in the conversation. This did not include the time of making the charge, or who made it. Evidence of these latter facts was, I think, incompetent, and its admission was error.

Evidence of another person was received, that he saw the entry on the book shortly after the delivery of the horse. This was also incompetent. In reference to this evidence the judge charged the jury, that making the charge by plaintiff, immediately upon his return to the store, was evidence of the sale of the horse. This, I think, was also error. This part of the charge was not qualified by stating that it would be evidence provided the jury believed that the defendant had promised to pay subsequently. It would not have been correct if so qualified. There was no pretense that the defendant made any admission of the time when the charge was made, or by whom. The case shows that the defendant might have been prejudiced by this evidence. When the issue was whether the horse was sold to the defendant, or whether he was to deliver him to Baird, to take to New York, and sell, on plaintiff's account, proof that the plaintiff made such a charge, directly after the transaction, and before any dispute arose, might have a controlling effect upon the jury. I think proof of the chattel mortgage given by Baird to defendant also inadmissible. These transactions between Baird and defendant had no tendency to show upon what terms the defendant received the horse in question. The only effect produced thereby would be, possibly, to create a prejudice in the minds of the jury against the defendant. I think the judgment should be reversed, and a new trial ordered.

PORTER, WRIGHT, SCRUGHAM, BOCKES, and PARKER, JJ., and DAVIES, Ch. J., concurred in the opinion of HUNT, J.

Judgment affirmed.

FARNHAM *against* MALLORY.*Court of Appeals; June Term, 1867.***CAPACITY TO SUE.—ESTOPPEL.—FORM OF JUDGMENT IN ACTION ON GUARANTY.**

One who has covenanted with executors, as such, that third persons shall satisfy and discharge a mortgage, is thereby estopped from denying the right of the executors to sue on such covenant, in their representative capacity.

In such an action, their interest in the enforcement of the covenant may be assumed.

In an action upon a covenant of guaranty by which the covenantor becomes surety for the punctual payment of the bond of other persons, and undertakes that, if default shall be made by them, he will pay and fully satisfy the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiffs the amount due, but that he should pay and satisfy, or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay to the plaintiffs the amount.

Appeal from a judgment.

This action was brought by George Farnham and Henry Womburgh, executors, against William M. Mallory, on a guaranty by Mallory of a bond given by the defendant, together with one Hiram W. Bostwick, to the plaintiffs, conditioned for the payment and discharge of a mortgage made by one Robert Miller, which was a lien on lands conveyed to the decedent by the defendant Mallory. The facts are more fully stated in the opinion of the court.

The following is a copy of the complaint :

“The complaint of the plaintiffs respectfully shows, That before the making of the bond or written obligation hereinafter set forth, to wit, on or about the 26th of Jan.,

1847, Lauren Mallory, one of the obligees in said bond named, sold and conveyed to William Womburgh, then of the town of Addison, by warrantee deed dated on that day, all those certain pieces or parcels of land described as follows: All that certain lot, piece, or parcel of land and premises situate and lying in the town of Big Flatts, being part of a tract of land conveyed by Henry Wisner, deceased, to John D. Coe and Benjamin Coe, beginning at the north-east corner of the lot hereby intended to be conveyed, being the north-east corner of a lot formerly owned by Henry Farr, running from thence south eighty-two degrees, east twenty-three chains and eighty-six links, to a stake to the lands of the late John Winton; thence along the same south fourteen degrees and fifteen minutes, west one hundred and two chains into the Tioga River; thence south seventy degrees and forty-five minutes, west eighteen chains and seventy-five links; thence north ten degrees, east one hundred and nine chains and forty links to the place of beginning; containing two hundred and eleven acres, excepting and reserving one acre heretofore conveyed to the First Presbyterian Society in the town of Big Flatts, and a lot now occupied by Ariel Higbee, forty-two feet in front and running back to the brook, said lot fronting on the road leading to Painted Post, and a lot on the east side of the road leading to the Canal, sixty feet front, and running back one hundred and sixty feet, formerly occupied by Titus Todd, and a lot on the same side of the road last aforesaid sixty feet front, running back one hundred and sixty feet, now occupied by and formerly occupied by Richard Jones, and a lot seventy feet front and running back one hundred and sixty feet, formerly occupied by Mrs. Hannah Miller, on the north side of the road leading to the Horseheads, and all the fruit trees, excepting those in the orchard. Also, excepting and reserving the lands heretofore conveyed to the New York and Erie R. R. Co., as described in a deed dated Dec. 20, 1840, recorded in the clerk's office in the county of Chemung, in book numbered six, page two hundred and sixty, on the 16th of

January, 1841. The covenants contained in said deed to be performed and fulfilled by the said party of the second part. Also excepting and reserving a lot heretofore conveyed to Alfred Griffin, John Minier, and George A. Gardiner, trustees of school district No. 1, in the town of Big Flatts, county of Chemung, and State aforesaid, containing eighteen hundred and forty-eight feet of land, as described in the deed dated the 16th day of March, 1838.

“Also one lot of land hereby intended to be conveyed, beginning on the line of the first described lot, at Joel Rowling’s south-east corner on said river; thence along said Rowling’s south line westwardly to the east line of land of George Gardiner to his south-east corner, continuing the same course to the line of the original patent; thence easterly along the said patent line to the south-east corner of the first described lot, from thence northerly and westerly along the line of the said lot to the place of beginning. The exceptions and reservations of the original patent excepted, containing, by estimation, sixteen acres. The aforesaid survey, as the needle pointed in the year 1805, excepting and reserving all the right and privilege granted to Archibald Rousseau by an instrument of writing dated April 15, 1845, and recorded in the clerk’s office in the county of Chemung, in book of deeds, number eleven, page 287.

“That before the time of the sale and conveyance aforesaid, to wit, on or about the sixth day of Sept., 1831, one Robert Miller (who was at that time the owner of the land hereinbefore described), executed and delivered to Isaac Bronson a mortgage upon said land, to secure the payment to said Bronson of the sum of three thousand and five hundred dollars, which mortgage was at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the land aforesaid. That the said Lauren Mallory, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Womburgh, that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record, the said mortgage aforesaid. That in consideration of the

sale and conveyance aforesaid, and the promise or agreement aforesaid made by the said Lauren Mallory to pay, satisfy, and discharge of record as aforesaid, the mortgage aforesaid, the said William Womburg paid to said Lauren Mallory a large sum of money, to wit, about the sum of eleven thousand dollars. That the said William Womburg died on or about the 21st of May, 1853, leaving a will wherein he nominated and appointed the above named George Farnham and Henry Womburgh executors of his last will and testament, who did, before the making of the said bond or writing obligatory by Lauren Mallory and Hiram W. Bostwick, hereinafter set forth, duly qualify and enter upon the discharge of the duties of executors of the said last will and testament of the said William Womburgh, deceased. That the said Lauren Mallory neglected to pay, satisfy, or discharge the mortgage aforesaid, but the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid at the time of the making of the said bond or writing obligatory hereinafter set forth.

“And the complaint further shows that the said Lauren Mallory and Hiram W. Bostwick, for the purpose of securing to the plaintiffs in this action, executors as aforesaid, the payment, satisfaction and discharge of the mortgage aforesaid, which still remained a lien and incumbrance as aforesaid, and for a valuable consideration made, executed and delivered to the plaintiffs aforesaid on the 26th of June, 1854, their bond or writing obligatory in words and figures following, to wit: [The bond is found in the opinion of the court.]

“And the complaint further shows that for the purpose of securing to the plaintiff's executors as aforesaid, the punctual payment of all moneys, and a full performance by the said Lauren Mallory and Hiram W. Bostwick, of all the conditions and covenants mentioned in the bond or writing obligatory made by the said Lauren Mallory and Hiram W. Bostwick, and hereinbefore set forth, and for a valuable consideration the said defendant William M. Mallory did, on the 26th day of June, 1854, make,

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execute, and deliver to the plaintiff's executors, as aforesaid, his written guarantee, which guarantee was annexed to said bond or writing obligatory as aforesaid, and was in words, &c. [This instrument is also set forth in the opinion of the court.]

"And the complaint further shows that the said Lauren Mallory and Hiram W. Bostwick have not, nor has either of them paid or caused to be paid or satisfied of record the said mortgage, or any part thereof, nor has the said defendant, William M. Mallory, paid or caused to be paid or satisfied of record the mortgage aforesaid, although often requested so to do, but the same still remains a valid and subsisting lien and incumbrance upon the land aforesaid.

"Wherefore the plaintiff's executors, as aforesaid, demand judgment of this court that the defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid, or that he be adjudged to pay to the plaintiffs the sum of seven thousand dollars, or such sum as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other and further relief and judgment as the court shall see fit to grant with costs."

George T. Spencer, for the defendant and appellant.—

I. This is an action in equity to enforce the specific performance of a contract, having for its object to compel the defendant to procure the discharge of a mortgage which is alleged to be a lien on lands conveyed to the plaintiff's testator. (1.) Although the distinction between actions at law and suits in equity is abolished by the Code, the substantial difference between legal and equitable relief is preserved (*Goulet v. Arseler*, 22 *N. Y.*, 225, 228; *Cole v. Reynolds*, 18 *N. Y.*, 74, 76; *Reubens v. Joel*, 14 *N. Y.* [3 *Kern.*], 493; *Haywood v. City of Buffalo*, 14 *Id.*, 534; *McCarty v. Edwards*, 24 *How. Pr.*, 236; *Mutual Benefit Life Ins. Co. v. Supervisors, &c. of N. Y.*, 32 *Id.*, 354). (2.) That the object of the action is to obtain equitable relief, may be inferred also from the form of the summons, taken in connection with the prayer

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for relief in the complaint ; the summons specifying that the plaintiff will apply for the relief demanded in the complaint, and the complaint asking that the defendant be required to perform specific acts (*Code of Procedure*, §§ 128, 129 ; *McCarty v. Edwards*, *supra*). (3.) The form of the action, statement of facts, and prayer for relief, require that upon an issue of fact upon the complaint, the same should be tried by the court, and not by a jury. This is not an "action for the recovery of money only, or of specific real or personal property," &c. (*Code of Procedure*, §§ 253, 254 ; *McCarty v. Edwards*, *supra*). (4.) This is not an action to recover damages. It is not alleged that such have been sustained ; none are demanded. The nature of the action is to be determined by the prayer for judgment or relief, as well as the statement of facts (*Hubbard v. Eams*, 22 *Barb.*, 597 ; *Gilbert v. Averill*, 15 *Id.*, 20).

II. As this is an action to obtain equitable relief, it must be determined, upon demurrer to the complaint, by the rules, and upon principles applicable to what are termed equitable actions. The demand for judgment or relief is as essential a part of the complaint, as the statement of facts ; and, if the facts alleged do not authorize the relief demanded, the complaint does not state facts sufficient to constitute a cause of action. When the sufficiency of the complaint is denied, the only question is whether, if the facts are admitted to be true, the plaintiff is entitled to the relief which he claims (*Code of Procedure*, §§ 141, 144 ; *General Mutual Ins. Co. v. Benson*, 5 *Duer*, 168, 175 ; *Livingston v. Painter*, 24 *How. Pr.*, 231 ; *Craig v. Hyde*, *Id.*, 313 ; *Mutual Benefit Life Ins. Co. v. Supervisors, &c. of N. Y.*, 32 *Id.*, 359 ; *Haywood v. City of Buffalo*, 14 *N. Y.*, 534, 540). (1.) The court, upon a mere issue of law, cannot grant relief exceeding that demanded in the complaint (*Code*, § 275). In such cases the prayer for relief determines the judgment which is to be given. Upon demurrer to the complaint, therefore, if the facts stated do not authorize the relief demanded, the complaint cannot be sustained (*Simonson v. Blake*, 20

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How. Pr., 484; *Marquat v. Marquat*, 2 *Kern.*, 336, 341; and cases above cited). (2.) The plaintiffs, having stated one cause of action, and framed their prayer for relief in accordance with the same, cannot recover for a different cause of action, though the facts might sustain it (*Walter v. Bennett*, 16 *N. Y.*, 250; *Lano v. Beam*, 19 *Barb.*, 51; *Hess v. Buffalo & Niagara Falls R. R. Co.*, 29 *Id.*, 391; *Walton v. Walton*, 32 *Id.*, 203; *Craig v. Hyde*, 24 *How. Pr.*, 313). (3.) It will appear that in this case the court has awarded judgment absolute, for a specific sum, as for damages—a relief exceeding that which is demanded in the complaint.

III. As this is an equitable action, to obtain specific equitable relief, and not an action for the recovery of damages or a specific sum of money merely, the complaint does not state facts sufficient to constitute a cause of action. (1.) The evident ground upon which the relief is sought, is, that the plaintiffs have an interest in lands incumbered by the mortgage satisfied which is set out in the complaint. But the complaint nowhere shows that they have any such interest. The provisions of William Womburgh's will are not set forth; and there is nothing to show that the executor acquired under it any interest in his real estate (*Buck v. Buck*, 11 *Paige*, 170). (2.) Such an interest is not to be inferred from the bond executed by Lauren Mallory and Bostwick. It is not recited in that instrument, and cannot be made out by inference or argument (*Carpenter v. Stilwell*, 3 *Abb. Pr.*, 459; *Boyce v. Brown*, 7 *Barb.*, 80, 85.) (3.) The guaranty set out in the complaint was executed by the defendant to secure to the plaintiff the performance of the bond given by Lauren Mallory and Bostwick upon the nominal consideration of one dollar, and is not, therefore, founded upon such a valuable consideration as will authorize judgment for a specific performance (*Adam's Eq.*, 78). (4.) No facts are stated in the complaint which show that the plaintiffs are, in any manner, damaged by reason of the mortgage they seek to have satisfied, or that they can by any possibility suffer any loss or even incon-

venience therefrom. (5.) The plaintiffs sue in their special character as executors of the will and testament of William Womburgh, deceased ; but the complaint does not state or show facts authorizing them to sue in that capacity. Neither does it appear that the will of William Womburgh was ever proved, or that letters testamentary were issued to the plaintiffs by any court or authority. It is not enough that they were so nominated in the will, or that they duly qualified and entered upon the discharge of their duties as executors. It is not even alleged that the plaintiffs are executors. (*Merrill v. Seaman*, 2 *Seld.*, 168 ; *White v. Joy*, 3 *Kern.*, 83 ; *Sheldon v. Hoy*, 11 *How. Pr.*, 11 ; *Bangs v. McIntosh*, 23 *Barb.*, 591). (6.) The contract of the defendant does not authorize the plaintiffs to bring this action in the capacity of executors, because ; *first*, they seek relief on grounds extrinsic of the contract ; *secondly*, the defendant's contract contains nothing showing the plaintiffs' character as executors ; and, *thirdly*, even if it did, he is not estopped from denying their right to such character (*Welland Canal Co. v. Hathaway*, 8 *Wend.*, 480 ; *First Baptist Society v. Rapalee*, 16 *Id.*, 605). (7.) The plaintiffs, having sued in their assumed character as executors, are not now at liberty to claim the right to recover in an individual character. The complaint shows that any damage arising in consequence of a breach of the defendant's agreement has been sustained by the heir or devise of William Womburgh, and not by the plaintiffs (*Chateau v. Suydam*, 21 *N. Y.*, 179). (8.) Even if the defendant's contract is to be deemed an admission by him of the plaintiffs' character as executors, it does not admit them to be such by authority derived from any sources in this State, and hence they cannot sue in its courts as such (*Parsons v. Lyman*, 20 *N. Y.*, 103 ; *Newton v. Bronson*, 13 *Id.*, 587). (9.) The plaintiffs do not show that they are entitled to relief in equity. On the other hand, the remedy at law furnishes adequate redress (*Mutual Benefit Life Ins. Co. v. Supervisors, &c. of N. Y.*, 32 *How. Pr.*, 359). (10.) The plaintiffs, having invoked the equitable powers only of the

court, and failed to make out a case of equitable cognizance, are not entitled to judgment (*Haywood v. City of Buffalo*, 14 *N. Y.* [4 *Kern.*], 534, 540).

IV. The complaint shows that Isaac Bronson, the mortgagee in the mortgage mentioned therein, is a necessary party to this action. Both the prayer for relief and the frame of the complaint are such that the matters in controversy cannot be determined, in this action, unless such mortgagee is a party thereto. The amount of interest due on the mortgage is not stated; and the defendant is interested that any adjudication of that amount should be binding on him (*Hubbard v. Eames*, 22 *Barb.*, 597; *Gilbert v. Averill*, 15 *Id.*, 20). (1.) It does not appear from the complaint that the mortgage is due. The defendant is therefore entitled to be made a party, that he may be bound by the adjudication of that question; since, if the mortgage is not due, payment cannot be compelled as against him. (2.) Judgment according to the prayer of the complaint would give the defendant the option of paying the mortgage to Bronson, in preference to the payment of so much as would be necessary to satisfy the same. Bronson is, therefore, a necessary party, for the purpose of receiving the money, and being required, on payment, to satisfy the mortgage of record (*Code of Procedure*, § 274; *Wells v. Smith*, 7 *Abb. Pr.*, 261; *Gilbert v. Averill*, 15 *Barb.*, 20; *Wandle v. Turney*, 5 *Duer*, 661). (3.) Judgment should be reversed, and given for the defendant on demurrer.

J. W. Dininny, for the plaintiffs and respondents.

—I. It appears from the complaint that the plaintiffs were duly appointed, and did duly qualify as executors of the last will and testament of William Womburgh, deceased, and were, at the time of the commencement of this action, acting as such. (1.) This was sufficient to authorize them to sue as executors (9 *How. Pr.*, 251). Any further allegations would have rendered the pleadings objectionable (10 *How. Pr.*, 48). (2.) This action is brought by the plaintiffs in the capacity or character in

which they took the bond and guaranty; and the defendant is estopped from denying his liability, or the right of the plaintiffs to bring the action in that capacity (16 *Barb.*, 281; 1 *Sandf.*, 168).

II. The plaintiffs may maintain this action in their own names, in their individual capacity (*Merritt v. Laman*, 6 *N. Y.* [2 *Seld.*], 168; *White v. Joy*, 13 *N. Y.* [3 *Kern.*], 83).

III. There is no defect of parties. (1.) The guaranty upon which this action was brought was executed by the defendant alone. It was an individual undertaking to pay and discharge the mortgage, upon the contingency that Lauren Mallory and Hiram W. Bostwick should not. (2.) It does not appear in any of the pleadings that either Isaac Bronson or Robert Miller was living at the time of the commencement of the action. (3.) The objection that they are not joined cannot be taken by demurrer. (4.) Bronson could not have been joined as a defendant. The plaintiffs had no claim against him, and they relied upon the bond in the guaranty, as an indemnity against any claims which he might make (14 *How. Pr.*, 460; 28 *Barb.*, 602). (5.) Miller could not have been joined. This action could in no manner prejudice his interests or rights. He could not have been compelled to satisfy the mortgage. The plaintiffs had no claim against him. The allegation that the mortgage was unpaid must be taken as true (*Cutler v. Wright*, 22 *N. Y.*, 472). Upon the latter supposition, the right of action was complete and properly brought.

IV. This action was properly brought in the name of the plaintiffs. (1.) The bond to which the defendant annexed his guaranty, was given to plaintiff in the precise name and title in which the action is brought. Lauren Mallory and Hiram W. Bostwick were under obligations to pay the mortgage to Bronson, and thereby save the estate of Womburgh, and the plaintiffs, harmless from its operation. The bond was founded on a valuable consideration, and was a valid obligation. Being such, the defendant had a right to, and, in fact, made a valid guar-

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anty of the performance thereof. (2.) It was unnecessary to allege that the plaintiffs had any interest in the land covered by the mortgage. The agreement made by Mallory to pay and discharge the Bronson mortgage was not a covenant which ran with the land. It had been forfeited previous to the death of William Womburgh, and Mallory was liable to an action on that agreement at the time of the former's decease. (3.) It was a personal action, and his executors were the proper parties to bring it.

V. The complaint states facts sufficient to constitute a cause of action. It sets forth the making of the bond, the guaranty, and the forms, terms and conditions thereof; the failure of Lauren Mallory and Hiram W. Bostwick to pay the mortgage, and that the defendant had not discharged the same of record as he was bound to do.

VI. No question on the demurrer can arise on this appeal. The appeal to this court is from the judgment entered on the decision of the general term of the supreme court affirming the order made at a special term thereof.

BY THE COURT.—DAVIES, CH. J.—The plaintiffs' claim in this action is based upon a guarantee of a bond made by Lauren Mallory and Hiram W. Bostwick to the plaintiffs, in these words:

“Know all men by these presents, that we, Lauren Mallory and Hiram W. Bostwick, of Corning, Steuben county, New York, are held and firmly bonded unto George Farnham and Henry Womburgh, both of Addison, Steuben county, New York, executors of the last will and testament of William Womburgh, deceased, late of Addison, in said county of Steuben, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said George Farnham and Henry Womburgh, executors, as aforesaid, the survivors or survivor, or his or their assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally,

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firmly by these presents. Sealed with our seals, dated the 26th day of June, in the year 1854.

“The condition of this obligation is such, that if the above bounden Lauren Mallory and Hiram W. Bostwick, their heirs, executors, or administrators, shall well and truly pay and satisfy of record, or cause to be fully paid and satisfied of record, and fully discharge a certain indenture of mortgage made and executed on the sixth day of September, 1831, by Robert Miller to Isaac Bronson, then of the city of New York, to secure the payment of the sum of three thousand five hundred dollars and interest, which mortgage is on the lands conveyed to said William Womburgh, now deceased, by the said Lauren Mallory and his wife, by deed, bearing date the 26th day of January, in the year 1847, which lands are situated in the town of Big Flatts, Chemung county, New York, and which mortgage is duly recorded in Chemung county clerk’s office, and which is to be paid, satisfied, and discharged by the above-bounden Lauren Mallory and Hiram W. Bostwick, as follows, viz :

“One thousand dollars and all of the interest on said \$3,500 due on the first day of July, 1855, is to be paid to apply as a payment on said mortgage on the first day of July, 1855, and all that shall remain unpaid, after making the said payment, on the first day of July, 1855, as aforesaid, of the said sum of \$3,500, together with all the interest thereon, shall be fully paid on the first day of July, 1856, and the mortgage shall be fully satisfied and discharged on the same first day of July, 1856, so that it shall be no longer a lien or incumbrance on said lands, nor of any force or effect, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.”

The defendant, William M. Mallory, on the 26th day of June, 1854, did make, execute, and deliver to the plaintiffs, as executors, as aforesaid, his written guarantee of said bond or obligation, and which was annexed to said bond, and is in these words :

“For and in consideration of the sum of one dollar to

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me in hand paid, the receipt whereof is hereby acknowledged, I do hereby become surety for the punctual payment of all moneys, and full performance of all the conditions and covenants in the annexed bond mentioned, to be paid, done, and performed by Lauren Mallory and Hiram W. Bostwick, and if any default shall be made by them, or if they shall refuse or neglect to fully pay or fulfill all or any of the payments, or perform all or any of the conditions mentioned in said bond, at any time, I hereby agree to pay and fully satisfy and discharge the mortgage mentioned in said bond, and fully perform in every respect all of the agreements and conditions mentioned in said bond, and at and within the time therein stated."

The complaint averred that on or about the 26th day of January, 1847, the said Lauren Mallory sold and conveyed to the said William Womburgh, by a warranty deed of that date, certain pieces and parcels of land therein described. That before said sale and conveyance, to wit, on or about the 6th day of September, 1831, one Robert Miller, who was at the time the owner of said lands, executed and delivered to Isaac Bronson a mortgage upon said lands to secure the payment to said Bronson of the sum of \$3,500, which mortgage was, at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the said land. That said Lauren Mallory, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Womburgh, that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record the said mortgage.

That in consideration of the sale and conveyance aforesaid, and the promise or agreement aforesaid, made by the said Lauren Mallory to pay, satisfy, and discharge of record as aforesaid the said mortgage, the said William Womburgh paid to the said Lauren Mallory about the sum of \$11,000. That the said William Womburgh died on or about the 21st day of May, 1853, leaving a will, wherein and whereby he appointed these plaintiffs executors of his last will and testament, who did, before the

making of the said bond or writing obligatory, by said Lauren Mallory and Bostwick, above set forth, duly qualify and enter upon the discharge of the duties of executors of said last will and testament. That the said Lauren Mallory had neglected to pay, satisfy, or discharge the mortgage aforesaid, and that the same still remained a valid and subsisting lien and incumbrance upon the lands aforesaid, at the time of the making of the said bond or writing obligatory. The complaint further averred that said Lauren Mallory and Bostwick, for the purpose of securing to these executors, as aforesaid, the payment, satisfaction, and discharge of the mortgage aforesaid, which still remained a lien and incumbrance aforesaid, and for a valuable consideration, made, executed, and delivered to said plaintiffs said bond or writing obligatory. The complaint also averred, that for the purpose of securing the punctual payment of all the moneys, and the performance of all the conditions and covenants mentioned in said bond, by said Lauren Mallory and Bostwick, the said defendant made, executed, and delivered to them the written guarantee therein set forth, and which has been already described.

The said complaint further averred that the said Lauren Mallory and said Bostwick had not, nor had either of them, paid, or caused to be paid, or satisfied of record, the said mortgage, or any part thereof; nor had the said defendant Mallory paid, or caused to be paid, or satisfied of record the mortgage aforesaid, although often requested so to do, but that the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid.

Wherefore the plaintiffs demanded judgment that the defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid, or that he be adjudged to pay the plaintiffs the sum of \$7,000, or so much as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other relief and judgment as the court should see fit to grant.

To this complaint the defendant demurred, and assigned the following causes of demurrer.

1. That it does not appear by the complaint that the plaintiffs have legal capacity to sue as executors.

2. That there is a defect of parties in this, that the said Isaac Bronson is a necessary party, and is not made a party plaintiff herein.

3. That there is a defect of parties, in that the said Robert Miller is a necessary and proper party, and is not made a party defendant herein.

4. That there is a defect of parties, in that the said Lauren Mallory is a necessary and proper party defendant, and is not made a party defendant herein.

5. That there is a defect of parties, in that said Bostwick is a necessary and proper party defendant, and is not made a party defendant herein.

6. That said complaint does not state facts sufficient to constitute a cause of action.

7. That it appears by the said complaint that the plaintiffs are not entitled to the relief therein demanded.

8. That it does not appear in or by said complaint that letters testamentary or of administration have been issued to the plaintiffs, or at what time, or by what court or authority.

9. That it does not appear in or by said complaint that the plaintiffs, at the time of the commencement of the action, or at any other time, had any estate or interest upon the lands upon which said mortgage was a lien or incumbrance, or that the plaintiffs were in any way injured or prejudiced by the existence of said lien or incumbrance.

10. That it does not appear in or by said complaint that the defendant has had any notice of any breach of any of the conditions of the bond set forth in the complaint, of the refusal or neglect of the obligors therein to pay or fulfill all or any of the payments, or perform all or any of the conditions mentioned in said bond.

11. There is no sufficient breach of any of the conditions of said bond set forth in the complaint alleged therein.

12. There is no sufficient breach of the agreement of the defendant stated or alleged in said complaint.

Judgment was given for the plaintiffs, overruling said demurrer, at special term, unless the defendant, within thirty days, should answer on payment of costs. Said order, on appeal, was affirmed at general term.

The cause coming on again to be heard at special term, judgment was again rendered for plaintiffs for the amount then due upon the said bond and mortgage, amounting to the sum of \$3,686.47, and the costs of this action. And, upon appeal to the general term, said judgment was affirmed, and the defendant now appeals to this court.

The supreme court correctly held that the grounds assigned in the demurrer interposed by the defendant presented no obstacle to the plaintiffs' recovery.

The engagement or contract of the defendant with these plaintiffs was absolute, that in the event Lauren Mallory and Bostwick should fail in the performance of their covenants, then the defendant agreed to pay and fully satisfy and discharge the said mortgage to Isaac Bronson, and fully perform in every respect all the covenants and agreements contained in the bond of Lauren Mallory and Bostwick on their part to be done and performed.

The prayer of the complaint was that the defendant should pay and satisfy, or cause to be paid and satisfied, the said mortgage to Isaac Bronson, or should be adjudged to pay to the plaintiffs a sum sufficient to pay and satisfy of record the said mortgage.

As already observed, the judgment of the supreme court is that the defendant should pay absolutely to the plaintiffs the amount of the said judgment. In this I incline to think that court erred, and that the judgment should have been that the defendant should pay and satisfy, or cause to be paid and satisfied of record, the said mortgage to Isaac Bronson, within thirty days from the date of said judgment, or, in the event of his not doing so,

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then that he pay to the plaintiffs the amount of the said judgment.

With this modification, I am for the affirmance of the judgment, with costs.

BOCKES, J.—This is an appeal from a judgment of the supreme court, in favor of the plaintiffs, on demurrer to the complaint.

The case made by the complaint is as follows: Lauren Mallory owned lands, on which there was a mortgage lien of \$3,500.

He sold and conveyed the lands to William Womburgh, by warranty deed, and agreed with the latter to assume, pay off, and discharge the mortgage. Womburgh died, and the plaintiffs were appointed his executors. For the purpose of securing performance of the agreement, to satisfy the mortgage, Mallory, with Hiram W. Bostwick as his surety, made a bond to Womburgh's executors, in the penal sum of \$7,000, conditioned that they would satisfy and discharge the mortgage by installments—the last one to be paid on the 1st July, 1856.

The defendant thereupon, and by a separate instrument, under seal, became surety for Mallory and Bostwick, and agreed that in case they should neglect or refuse to fulfill the condition of the bond, he would perform it according to its terms.

All the parties having omitted performance of the condition, this action was instituted to enforce the defendant's obligation.

The facts above cited are all alleged in the complaint, and very manifestly show a good cause of action.

The case, briefly stated, is this: The defendant covenanted and agreed with the plaintiffs that Mallory and Bostwick should satisfy and discharge the mortgage. They omitted so to do, as did also the defendant; the latter was, consequently, in default on his agreement.

The supreme court was very clearly right in giving judgment for the plaintiffs on the demurrer.

Nor was the complaint open to any technical or formal objection as a pleading.

The plaintiffs were authorized to maintain the action as executors. It is averred that William Womburgh was dead, and that they had been duly appointed the executors of his will and testament; and it also appears that the bond and instrument of suretyship were made to them as such executors. The defendant, having made the agreement with them as executors, is estopped from denying their right to bring the action in their representative capacity; and it must be assumed, too, that they have an interest in the enforcement of the agreement. The defendant, by his agreement, was under personal engagement to them as executors; and having broken his covenant with them, they could enforce his liability.

The only difficulty in the case is in the form of the judgment.

The judgment, as entered, is absolute—that the plaintiffs recover the amount remaining unpaid on the mortgage, to wit, \$3,686.47, with interest from October 4, 1858.

There is no security that the plaintiffs will appropriate the recovery to the payment of the mortgage debt.

If collected by them, they may refuse, or become unable to satisfy the debt with the money, and leave the bond to be enforced against the obligor.

There should be a provision in the judgment to meet this contingency.

If the executors had, in fact, paid off the debt and satisfied the lien, there would then be no difficulty; their recovery should then be absolute for the amount paid.

But this they have not done. They have yet suffered no damage, and the action is brought with a view to protect them (and those interested through them in having the agreement fulfilled) from injury.

The action is for a specific performance of personal

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covenants—a specific performance of an agreement of indemnity.

There was no difficulty, consequently, in so framing the judgment or decree as to meet the requirements of the case, and protect the rights of all interested in the subject-matter of the action, although not parties.

The judgment should have been to the effect that the defendant specifically perform his covenant and agreement, by satisfying and discharging the mortgage within a time to be specified, or, in default thereof, the plaintiffs recover judgment against him for the sum remaining unpaid on the mortgage; that judgment be forthwith docketed against him for such amount, to stand as security and to be enforced by execution, in case of his neglect to satisfy and discharge the mortgage within the time specified; that, in case of sale or collection under execution, the sheriff bring the amount collected into court to abide its order, and that the plaintiffs be at liberty to apply to the court for further relief, if necessary. Also that the plaintiffs recover the costs and disbursements of the action.

This, in my judgment, should have been the form of the decree.

I am therefore of the opinion that the judgment of the supreme court in favor of the plaintiffs, on the demurrer to the complaint, should be affirmed, with costs, but with a modification of the details in accordance with the above suggestions. And in my judgment the defendant should be charged with the costs on the appeal to this court. The litigation is without excuse on his part.

His agreement was clear and specific, and, for aught that appears, was fairly and understandingly entered into.

It should have been faithfully performed.

The modification now suggested is formal merely, and is to meet a contingency which may arise in case of justification by him in his unfaithfulness. He should therefore reap no benefit from it.

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The judgment against him is in effect affirmed ; and it should, as I think, be with costs of appeal.

On consultation, the judgment was modified in accordance with opinion of DAVIES, Ch. J.

HASBROOK *against* THE KINGSTON BOARD OF
EDUCATION.

Court of Appeals ; June Term, 1867.

APPEALABLE ORDER.—REFUSAL TO GRANT INJUNCTION.
—REMEDY AGAINST ILLEGAL TAX.

A refusal to grant a temporary injunction against the collection of a tax, where but a small portion of the amount involved in the controversy can be affected at the time by such temporary injunction, is not an order which in effect determines the action, and prevents a judgment from which an appeal might be taken ; and therefore an appeal does not lie from it to the court of appeals.

If a motion for a temporary injunction is denied, not on the ground that the plaintiffs could ultimately have no relief, but because a temporary interference was not deemed advisable by the court to which the application was made, the court of appeals will not review the discretion of that court upon the question.

In order to sustain an appeal, the papers should show that the motion was denied upon the ground that the plaintiffs could ultimately have no relief.

An injunction cannot issue to restrain the collection of a tax, although illegally imposed.

Of the power of boards of education to raise moneys for educational purposes by taxation.

Appeals from orders.

Two appeals were taken in actions relating to the collection of the same tax, and raising the same question ; and were brought before the court of appeals at the same

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time. The one was in an action brought by Abraham B. Hasbrouck and others, appellants, against the Kingston Board of Education, Elijah Ellsworth, collector, and Cornelius Burhaus, treasurer of the Kingston School District, respondents. The other was in an action brought by the People of the State of New York, appellants, against the same defendants, respondents.

They were appeals from orders of the supreme court at general term, affirming orders made at special term, denying motions for temporary injunctions to restrain the collection of the tax, and the disbursement of the moneys.

The Kingston Board of Education was incorporated by an act of the legislature, passed in 1863, and amended in 1864 (*Laws of 1863*, ch. 360 ; *Laws of 1864*, ch. 40), for the establishment and maintenance of free public schools in the Kingston School District ; and the said act, as amended, provides that the said Board of Education shall have power, and it shall be their duty to raise, from time to time, by tax, to be levied upon all the real and personal estate in the Kingston school district, "such sums as they may determine to be necessary and proper for the payment of the salaries of the superintendent and teachers in the public schools under their charge, repairs of school-houses, fences, out-buildings, and grounds belonging thereto, and all other necessary and contingent expenses for establishing and maintaining the said public schools, and the necessary and contingent expenses of the Board of Education."

The Board of Education, in the spring of 1866, determined that it was necessary and proper to raise by tax the sum of \$22,000, to meet deficiencies of the last, and the expenses of the then current year, for the purpose aforesaid ; and thereupon levied and assessed a tax for that sum, and delivered the tax-roll, with the usual warrant for its collection, on the fourth day of June, 1866, to the defendant, Ellsworth, for its collection.

On the 16th of July, 1866, and after nearly \$14,000 in amount, of the tax, had been collected, and a portion there-

of disbursed, Abraham B. Hasbrouck and four others, in behalf of themselves and "all other taxable inhabitants and other persons having property liable to taxation in the Kingston School District," commenced the first above-entitled action against the Board of Education, their collector and treasurer, to restrain them from the collection of that part of the tax remaining uncollected, and from paying out, disbursing, and appropriating the moneys collected.

At the special term of the supreme court held in July, 1866, the plaintiffs in the first-mentioned cause applied for a temporary injunction, to restrain the collection of the tax, and disbursement of the moneys collected, during the pendency of the suit. That motion was denied, and the injunction refused. From that decision an appeal was taken to the court at general term in the third district. The order made at special term was there affirmed, and from that affirmance an appeal was now taken to the court of appeals.

After the denial of the injunction in the first cause, an action was commenced in the name of the people, by the attorney-general, the complaint containing substantially the same allegations as those contained in the other cause, demanding judgment for a perpetual injunction to restrain the levy, assessment, and collection of any taxes by the defendants, without authority of the inhabitants, other than for certain limited purposes, and for those purposes not exceeding \$5,000 ; and to restrain any further proceedings in the collection of the taxes then assessed, and disbursement of the moneys, and for other relief.

A motion for a temporary injunction to restrain the collection of the tax and disbursement of the moneys was made in that cause, and was denied. From the order denying it, an appeal was taken to the court at general term, where the order was affirmed ; and an appeal was now taken to this court from that decision also.

E. Cooke, for the appellants.—I. The defendants, to justify their proceedings, must maintain that the expense

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clause in the former part of section 13 covers all the purposes of the school district, and gives the board an unrestricted power of taxation. Such a construction is inadmissible. (1.) It renders inoperative the entire provision in that section for raising an additional tax of \$5,000, upon a vote of the district, thus violating the fundamental rule of construction of statutes, which requires that effect shall be given to every provision of a statute. (2.) It results in palpable absurdity. Its effect would be, the board having been made the exclusive judges of what sums are necessary and proper to be raised, and how often, to give the same power to raise by tax all sums necessary and proper to be raised, with permission, after such duty had been performed, to raise, if they chose, an additional sum beyond what was necessary or proper, for the same purposes; but to restrict the improper and unnecessary levy to \$5,000.

II. If the language is obscure, or if a literal interpretation would render the provision absurd, the sense of the legislature must be sought in the object and spirit of the act (*Rice v. Mead*, 22 *How. Pr.*, 449; *People v. Utica Ins. Co.*, 13 *Johns.*, 380; *Jackson v. Collins*, 3 *Cow.*, 89; *White v. Magee*, 32 *Barb.*, 253; *Beebe v. Griffin*, 14 *N. Y.* [4 *Kern.*], 235). (1.) The original act of 1863 disclosed the policy of the law to impose a restriction upon the powers of the board to tax the district. That the legislature did not design to remove that restriction by the amendment of 1864, is evident from the fact that the \$5,000 limit remains in the section. The necessary and contingent clause is included in the restrictive portion of the section as well as in the former. The language is no less comprehensive there than in the other connection. Its being there is conclusive evidence of the intention of the legislature to place it under the restriction. (2.) The general description of necessary and contingent expenses following the specific objects of teachers' wages and repairs, must be referred to those specified objects, according to the rule, that "general words following particular words apply only to things '*ejusdem generis*'" (*Chegary v. Mayor, &c.*, 13

N. Y. [3 *Kern.*], 229 ; *Casher v. Holmes*, 2 *Barn. & Adol.*, 592). (3.) The only objects specified in the estimate for which the board had power to levy a tax without authority from the inhabitants, were salaries, teacher's wages, and repairs to buildings.

III. The right to levy a tax to repay money borrowed to discharge the teacher's wages, cannot be supported under the general corporate powers of the board. (1.) Their powers are restricted to the purposes specified in the act. (2.) The act (§ 19, subd. 6) provides for the payment of teacher's wages out of moneys to be raised by tax (Citing 1 *Rev. Stat.*, 600, § 3 ; *Hodges v. City of Buffalo*, 2 *Den.*, 112 ; *Halstead v. Mayor, &c. of New York*, 3 *N. Y.* [3 *Comst.*], 433).

IV. The \$5,000 limitation applies to the whole section, and is to be construed as limiting the amount of taxes for any one year, whether levied with or without the consent of the taxable inhabitants. (1.) Section 19, subdivisions 3 and 6, specifies teacher's wages and repairs, and these, by the concluding paragraph of section 13, are peremptorily subjected to the restrictive provision. (2.) The words "not exceeding \$5,000 in any one year," apply to all taxes to be raised. This clause, in short, if not general in its application, is totally ineffectual for any purpose. The duty of the court is to give it effect. (3.) The object of this permission was not to compel an unwilling board of education to expend a larger amount than such board should deem necessary. (4.) The language is permissive, not mandatory. (5.) No way is provided for calling a regular meeting of the inhabitants to take a vote, except through the board, and at their option (§ 6). (3.) The board can, consequently, levy a tax only for superintendent's and teacher's wages, and repairs, and for those purposes not to exceed \$5,000 in any one year.

V. The wrongs committed and threatened by the defendants are the proper subject of equitable cognizance, and the plaintiffs are entitled to the relief demanded. (1.) The Kingston School District is made a full corporation, and the Board of Education invested with the general

corporate powers defined by the revised statutes (*Laws of 1863*, 593, § 9). (2.) The corporation exists only for its own purposes, and the duties of the board concern only the strictly corporate interests of the district. In this respect they are distinguishable from such municipal and *quasi* corporations as exercise political functions necessary in the administration of the government (*Lorillard v. Town of Monroe*, 11 *N. Y.* [1 *Kern.*], 392; *Morey v. Town of Newfane*, 8 *Barb.*, 651; *Riddle v. Proprietors of Locks, &c.*, 7 *Mass.*, 169; *Doolittle v. Supervisors of Broome*, 18 *N. Y.*, 155). (2.) The reasons, therefore, upon which equitable interference to prevent the collection of an illegal State, county, or town tax, or individual redress for the wrong of collecting such a tax is denied, do not apply to this case (Citing 3 *Hill*, 612; *Delmonico v. City of New York*, 1 *Sandf.*, 222; *Mower v. Leicester*, 9 *Mass.*, 247; *Lorillard v. Town of Monroe*, *supra*; *Doolittle v. Supervisors of Broome*, *supra*).

VI. The corporation is a trustee, and its constituents the *cestui que trust*, and a court of equity takes jurisdiction of the case as of a trust (*Ang. & A. on Corp.*, §§ 312, 391; *Willard Eq.*, 739). It was so expressly declared in the act creating the district (See *Laws of 1863*, 600, 601, § 21; *Dodge v. Woolsey*, 18 *How. U. S.*, 331).

VII. A court of equity will intervene at the suit of a member to restrain a corporation from wasting or misapplying its funds (*Ang. & A. on Corp.*, §§ 312, 391, 392, 393; *Robertson v. Smith*, 3 *Paige*, 233; *Hichens v. Congreve*, 4 *Russ.*, 562; *Bissell v. Michigan, &c. R. R. Co.*, 22 *N. Y.*, 275; *Dummer v. Corporation of Chippenham*, 14 *Ves.*, 245; *Bromley v. Smith*, 1 *Sim.*, 8; *Gray v. Chaplin*, 2 *Sim. & St.*, 267; approved in 18 *N. Y.*, 167). (1.) The gravamen of the present action is to prevent a misapplication of the moneys over which the Board of Education have control, to purposes not authorized. As the only object of collecting it is thus to misapply and waste it, the collection should be restrained as incident to the relief principally claimed. (2.) The action is thus sustainable upon the authorities cited, even were it the case

of a public tax, where reasons of public convenience would ordinarily incline the court not to restrain the collection of a tax.

M. Schoonmaker, for the respondents.—I. The decision of the general term, affirming the orders denying the motion for an injunction, were final, and no right of appeal therefrom exists to this court. (1.) The granting, continuing, or dissolving a temporary injunction rests in the discretion of the court of original jurisdiction (*Vandewater v. Kelsey*, 1 *N. Y.* [1 *Comst.*], 533 ; *Selden v. Vermilyea*, *Id.*, 534). (2.) The orders appealed from are not embraced within that class of orders from which an appeal is permitted by section 11 of the Code. (3.) The additional words inserted in subdivision 2 of section 11, by the amendment made in the Laws of 1867, ch. 781, § 2, “or discontinues the action,” cannot avail the appellants. (4.) The refusal to enjoin does not leave either suit in a situation by which the defendants can, by collection of the tax, render further proceedings in the action useless.

II. The injunctions were properly refused. The supreme court has no jurisdiction to restrain the collection of a tax by injunction, even if the same has been illegally imposed ; the parties injured thereby have an adequate remedy at law (*Haywood v. City of Buffalo*, 14 *N. Y.* [4 *Kern.*], 534 ; *Mutual Benefit Life Ins. Co. v. Supervisors of New York*, 32 *How. Pr.*, 359). (1.) An injunction to prevent the collection of a tax for the maintenance of public schools, if granted, would be productive of public injury and inconvenience. (2.) Persons aggrieved have a full remedy by suit at law against the members of the Board (*Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 31 *N. Y.*, 93). (3.) All parties aggrieved have a more appropriate and effectual remedy by appeal to the superintendent of public instruction (*Laws of 1864*, 1284, § 1, subd. 7). (4.) On such an appeal, the superintendent has power to correct errors in taxes ; to direct a new levy ; to authorize the refunding of money improperly collected ; and to stay the collection of a tax during

the pendency of the question before him. He has also authority to determine what are contingent expenses, and his decision is conclusive (*Laws of 1864*, 1278, § 18). (5.) As to whether his jurisdiction is exclusive, see *Storm v. Odell* (2 *Wend.*, 287); *Laws of 1827*, ch. 15, tit. 2, § 10.

III. The order appealed from in the action brought by Hasbrouck and others, should be affirmed. (1.) No individual members of a community, either in their own names, or in the names of themselves and others, can, or have any right to maintain actions to restrain the collection of taxes (*Doolittle v. Supervisors of Broome*, 18 *N. Y.*, 155; *Roosevelt v. Draper*, 23 *Id.*, 318; *Ketchum v. City of Buffalo*, 14 *Id.* [4 *Kern.*], 356). (2.) A large portion of the taxable inhabitants having voluntarily paid their taxes, there is no longer any community of interest among them, upon which to sustain an action brought in their names or for their benefit (*Habicht v. Pemberton*, 4 *Sandf.*, 657).

V. Upon the merits, the injunctions were properly denied in both cases. The Board of Education have not exceeded the powers conferred upon them by statute. (1.) The act of incorporation of the defendant Board of Education expressly conferred upon them the right to levy and raise such sums as they might determine to be necessary and proper for the payment of salaries, &c. (2.) The amount of such taxes is left to their judgment; and in the exercise of the latter they act judicially. (3.) The general power of taxation, conferred as above cited, is not curtailed or rendered nugatory by the subsequent clause of the section providing for the raising of additional sums, not exceeding \$5,000, in any one year. (4.) The rules of construction, as now favored or established by the courts, do not favor an implied revocation of powers conferred for public purposes, nor any construction which nullifies any part of a statute; they require statutes to be so construed as to give effect to every provision of the act. (5.) Upon the principles governing the construction of statutes, counsel cited *Broom's Leg. Max.*, 247, 4th ed., 440;

Waller v. Harris, 20 *Wend.*, 555; 1 *Kent Com.*, 462; Ketchum v. City of Buffalo, *supra*; McCluskey v. Cromwell, 11 *N. Y.* [1 *Kern.*], 593; *Broom's Leg. Max.*, 266-268, 4th ed., 477-480; Purdy v. People, 4 *Hill*, 384; Newell v. People, 7 *N. Y.* [3 *Seld.*], 97; Gibbons v. Ogden, 9 *Wheat.*, 188; Wilkinson v. Adams, 1 *Ves. & Beam.*, 466; McCartee v. Orphan Asylum, 9 *Cow.*, 437; Bowen v. Lease, 5 *Hill*, 221; 19 *Vin. Abr.*, 525, *Pl.* 132; Weed v. Tucker, 19 *N. Y.*, 422). (6.) The provisions of the second clause in question are cumulative, and not restricted in their terms; they do not curtail the powers granted to the Board in the previous clause. (7.) An additional power does not contemplate a restriction of existing power. (8.) The limitation of \$5,000 does not refer to or restrict the amount of money authorized to be raised by the board in the first clause of the section; it limits only the *additional* sum authorized to be raised by direction of the inhabitants. (9.) The fact that the second clause authorizes the raising of such additional sums, is not restrictive of the powers given in the first clause, notwithstanding it may cover the same ground. The entire power given in the section may exist in both cases. (10.) The construction contended for by the defendants is in accordance with the manifest intention of the legislature. The object of the legislature was the establishment and maintenance of free public schools, and to make full provision for the education of the children in the Kingston School District; and for that purpose, extended powers are conferred upon the board of education by the act of incorporation. (11.) Section 13 of that act was amended, in order to authorize the raising of a larger amount of money, than the original act provided for, the amount prescribed in the latter having proved insufficient for the purposes indicated.

V. The tax complained of was levied only for the purposes specified within the authority aforesaid.

VI. Even if the court are of opinion that the board have erred and exceeded their powers, the remedy is not by injunction to stay the tax, but by actions at law

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against the members of the board, or by appeal to the superintendent of public instruction.

VII. The appeals in both of the above cases should be dismissed with costs.

HUNT, J.—The objection is made, that the orders in question are not appealable to this court. I think the objection is well taken.

It is claimed that the appeal is sustainable under subdivision 2 of section 11 of the Code, which gives such appeal from "an order affecting a substantial right . . . when such an order in effect determines the action, and prevents a judgment from which an appeal might be taken," or discontinues the action, or grants or refuses a new trial. The order in question does not determine the action or prevent a judgment from which an appeal might be taken. It may possibly prejudice the plaintiffs to the extent of that portion of the tax of 1866 yet uncollected; but the action remains, with the question to be decided by it, for future years, and with the power of appeal from the judgment to be rendered. If it shall be held, ultimately, that the plaintiffs are right, then the defendants, in their levies, will be restricted to \$5,000 a year, or be limited to the specific items admitted by the plaintiffs to be properly within their jurisdiction.

If the defendants' view is sustained by the courts, they will be at liberty the next year, and so long hereafter as the law shall remain unrepealed, to levy such sums as they may determine to be necessary and proper for the purposes specified in the act. There is evidently much the most important duty of the action yet to be performed.

The amount of the present tax, yet uncollected, is trifling compared with the amount which will be determined by the judgment yet to be rendered. The orders in question do not, in effect, determine the action, or prevent a judgment from which an appeal can be taken, and are therefore not appealable to this court.

Again. The papers do not show whether the motion

was denied upon the ground that the plaintiffs could ultimately have no relief, or because a temporary interference was not advisable. In the latter case, the motion below was addressed to the discretion of the court; and the general term having acted, we cannot review their determination (*People v. New York Central R. R. Co.*, 29 *N. Y.*, 418; *Clark v. City of Rochester*, 34 *Id.*, 355). Whether the interests of the individuals who had not yet paid their tax should command the interposition of that tribunal, or whether the interests of education were the more important in the particular case, were matters for the discretion and judgment of the court below. In such cases we require them to act, but we do not assume to determine what their action shall be (See cases above cited).

I am of the opinion, also, that an injunction cannot legally issue to restrain the collection of a tax, although illegally imposed (*Haywood v. City of Buffalo*, 14 *N. Y.* [4 *Kern.*], 534, 537; *Mutual Benefit Life Ins. Co. v. Supervisors of N. Y.*, 32 *How. Pr.*, 359).

The party must take his remedy by action for the damages he has sustained. (*Id.*).

Upon the merits, I am also of the opinion that the action of the board was legal. Section thirteen of the act in question, as originally passed, authorized the Board, and made it their duty "to raise, from time to time, by tax, . . . such sum, not exceeding in all \$5,000 in any one year, as they may determine to be necessary and proper, and such additional sum as the taxable inhabitants at an annual meeting may direct to be raised, not exceeding the like amount of \$5,000 as aforesaid, for any and all of the purposes to which the powers and duties of the said Board extend, as hereinafter mentioned" (*Laws of 1863*, 597).

The evident intent of this act was to limit the power of the Board to the sum \$5,000 as the amount authorized to be raised on their own discretion in any one year.

If, however, the taxable inhabitants should think proper to order the raising of an additional sum of the

like amount, then it became the duty of the Board to raise that amount also ; all of which sums were to be applied indiscriminately to the purposes to which the powers of the Board extended.

In 1864 (ch. 40, § 1), the section in question was amended, so that it read as follows: "§ 13. The said Board of Education shall have power, and it shall be their duty to raise, from time to time, by tax, to be levied," &c., "such sums as they may determine to be necessary and proper for the payment of the salaries of the superintendent and teachers in the public schools under their charge, repairs of school-houses, fences, out-buildings, and grounds belonging thereto, and all other necessary and contingent expenses for establishing and maintaining the said public schools, and the necessary and contingent expenses of the Board of Education. And they may also raise such additional sum, not exceeding \$5,000 in any one year, as the taxable inhabitants of said Kingston School District may at any meeting, regularly called, authorize or direct, for the purchase of school-houses, lots or sites for school-houses, and to defray the expenses of the erection, altering, and improving school-houses, out-houses, and their appurtenances, or for such other purposes as are included within the powers and duties of the Board of Education as hereinafter mentioned."

Although there may be difficulty in giving an accurate grammatical or technical reading to this language, there is but little difficulty in ascertaining its meaning.

For the ordinary current expenses of maintaining the school system organized by the act, such as teachers' salaries, repairs of buildings, and contingent expenses, the Board was authorized to raise money in their discretion, and without limit as to the amount.

If it was desired to purchase school-houses, or lots on which to erect school-houses, or to alter or improve in a permanent manner the school buildings in use, permission or authority was to be obtained from the taxable inhabitants duly assembled. The fact that such meeting might direct the raising of moneys for other purposes included

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within the powers of the Board, does not interfere with this construction. It was simply superfluous. The Board already had the power.

Neither do I see any difficulty to arise if it should be held that a like power was intended to be given to the citizens when regularly assembled as directed by the act.

Under the decision in *Ketchum v. City of Buffalo* (14 *N. Y.* [4 *Kern.*], 361), the power "to establish and maintain schools" is very comprehensive, and, if needed for that purpose, would give large powers to the Board in question. There is no evidence in the present case that the Board have attempted to raise money for any other than legitimate purposes.

The adoption of the statement set forth in the complaint as the ground of their levy is expressly denied, and it is averred that the proposed levy was made for the purpose of providing for the payment of the salaries of the superintendent and teachers, repairs to the school-houses, and other contingent expenses, and to pay arrears for the same purpose, for which they were indebted. These were properly and legitimately within their control.

Both upon the form and upon the merits, I am of the opinion that the appeals should be dismissed, with costs.

All the judges concurred.

WRIGHT and PORTER, JJ., not voting.

Appeals dismissed.

Revised
May 22nd.

BENNETT *against* BUCHAN.

Supreme Court, Fifth District; General Term, Oct., 1868.

POWER OF PARTNERS AFTER DISSOLUTION.—CONSTRUCTION OF COVENANT.—DAMAGES.

After the dissolution of a copartnership, J. B., one of the partners, without the authority or assent of S. R., the other, assigned for \$100 a judgment which had been obtained before the dissolution. The assignment was executed under the firm name.—*Held*, that the assignment was effectual to vest in the assignee all the interest and title of both partners in the judgment, but not to make S. R., who did not sign the instrument, liable on the covenants contained therein.

The assignment contained covenants "that there is now due on said judgment the sum of \$1,038.46, and interest from Sept. 2, 1861," and "that they (J. B. & Co.) will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment." The whole amount of the judgment, as docketed Sept. 2, 1861, was \$1,038.46. Before the dissolution, S. R., in consideration of *ten per cent.* of the judgment, had executed in the firm name, without the knowledge of J. B., a release under chap. 257, *Laws of 1838*, whereby one of the four judgment debtors was exonerated from all liability. It was found after the assignment that the exonerated debtor was solvent, and able to pay the whole debt. The other judgment debtors were dead or insolvent, except one, from whom the assignee of the judgment collected \$102.16, on execution.

Held, that the plaintiff's measure of damages against the defendant, J. B., for breach of the covenant, was *ten per cent.* of the judgment,—*i. e.*, \$103.84, and interest from Sept. 2, 1861,—and that the \$102.16 could not be applied in reduction thereof.

The covenant that the whole amount of a judgment is due is not to be construed to mean, that no one of the judgment debtors has been released.

Appeal from a judgment in favor of the plaintiff on the report of a referee.

The action was brought to recover damages alleged to have been sustained by the breach of warranty by the defendants, and sale by them to the plaintiff, of a judgment which they held against Dorans, Gillett & Co.

The defendants were copartners doing business in the city of New York under the firm name of James Buchan & Co. On the 2nd of Sept., 1861, they recovered a judgment for \$1,038.46 against Erasmus D. Doran, James E. Doran, Allen H. Gillett, and Homer W. Wooster, composing the firm of Dorans, Gillett & Co., all of Syracuse, and the judgment was on that day docketed in the clerk's office of Onondaga county. On the 19th of March, 1863, and after the dissolution of the firm of Dorans, Gillett & Co., Gillett, one of the copartners, obtained from Buchan & Co. a release from his individual liability on the judgment, under the "Act for the relief of partners and joint debtors," passed April 18, 1838 (*Laws of 1838*, ch. 257), for which release he paid ten per cent. of the whole amount of the judgment ; and no more was ever paid to Buchan & Co. thereon. At the same time of the rendition of this judgment, eleven other judgments were rendered and docketed against the same defendants in favor of divers plaintiffs, for the sum, in all, including the said judgment, of \$7,366.52, and were all equal liens upon the real estate of said firm of Dorans, Gillett & Co., and upon the individual real estate of each of such defendants.

The release to Gillett was executed by Stephen Rich, in the name of the firm of James Buchan & Co., and was filed in the clerk's office of Onondaga county, at Syracuse, October 7th, 1865, but was entered in the docket of judgments under the letter G only. Mr. Rich dissolved his connection with the firm on the 28th of January, 1865, leaving Buchan in possession of the business and assets. And before that time, the firm, considering the judgment which they so held worth little, if anything, charged it over to profit and loss. Previous to August, 1865, James E. Doran, one of the said judgment debtors, died, and in that month Anna Doran, the mother of the two defendants Doran, died intestate, leaving real estate worth \$2,800, and leaving three living children, and the heirs of a fourth, her heirs at law.

On the 15th of February, 1866, John C. Bennett, of Syracuse, the husband of the plaintiff, who is the sister

Bennett v. Buchan.

of the two Dorans, made an offer to James Buchan & Co., by letter, to pay \$100 for an assignment of the judgment, describing it as a judgment against Erasmus E. Doran, in which he said, "I will give you \$100 for the judgment. If you desire to accept my proposition, execute an assignment of the judgment in question to H. Amelia Bennett, and forward the same to me by express, C. O. D." This letter was answered on the part of Mr. Buchan, with a request to Mr. Bennett to procure and send to him a copy of the docket of the judgment, and Bennett went to the clerk's office and procured a copy, and sent it to Buchan by mail. The copy sent to Buchan was taken from the docket under the letter "D," and did not show that Gillett had been released from the judgment. Buchan thereupon executed the assignment to the plaintiff, in the firm name of James Buchan & Co., and sent it to Mr. Bennett, and received the payment of the \$100 therefor. The assignment contained a covenant, "that there is now due on the said judgment the sum of ten hundred and thirty-eight dollars and forty-six cents, and interest from Sept. 2, 1861, and *that they will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment.*" The referee found that the release of the judgment to Gillett was made in good faith, and that the assignment to the plaintiff was made in good faith, and without any intent to defraud any one, and without thinking of the release previously made to Gillett, and that the same was executed by Buchan without any authority therefor from Rich, and was never assented to by him afterwards.

The referee also found as matter of fact, that the plaintiff, when she took the title to the judgment by assignment, was not aware that Gillett had been released.

Several other facts were found by the referee, but the only ones material to the questions here were, that Erasmus D. Doran was not solvent so that the judgment could be collected of him, but that Gillett was of sufficient ability, so that it could have been collected of him but for the release. The referee reported in favor of the plaintiff, for

the full amount of the judgment and interest, less the sum of \$102.16, this latter sum being the amount, with interest, of what the plaintiff, after taking the assignment, had succeeded in collecting by an execution, from E. D. Doran,—leaving a balance of principal and interest of \$1,423.73, for which he ordered judgment in favor of the plaintiff. Judgment was entered thereon against Buchan with costs, the complaint being dismissed as to Rich, and Buchan appealed.

William J. Hough, for the plaintiff.

John M. Emerson, for the defendants.

FOSTER, J.*—The assignment of the judgment having been made after the dissolution of the copartnership of James Buchan & Co., by Mr. Buchan alone, and without the special authority or assent of Rich, it is contended that in any event, only the title of Buchan to the amount of one-half thereof passed to the plaintiff; and that, therefore no recovery can be had for more than one-half of it, less the one-half of what the plaintiff has already realized thereon.

The authorities cited to support the proposition fail to do so (*Sanford v. Mickle*, 4 *Johns.*, 22, &c., and *Geortner v. Trustees*, 2 *Barb.*, 625) and only enunciate the principle that after the dissolution of the copartnership, one of the partners cannot dispose of the partnership choses in action, without the authority or assent of the other, as to make him liable upon any covenants or obligations which he assumes on such transfer.

In *Sanford v. Mickle* the transfer by one of the partners was of a negotiable note, which was payable to order, and was indorsed with the firm name by the partner who transferred it, and all the court held, was, that he could not create by such indorsement any liability against his late copartner.

It is true that the court, YATES, J., said “it is impos-

* Present, FOSTER, MULLIN, and MORGAN, JJ.

sible to separate the right to indorse a bill by one, passing the title, from the legal responsibility on all those having an interest in it," and that one could not transfer the note; but I think there is no doubt that he could by an indorsement of the note in the firm name without recourse, transfer the title thereto to the full extent that he could have done in respect of any other of the partnership property. And although the language of the court is more general and broader than the case called for, the decision was only that the other copartners were not liable as indorsers of the note. And in *Geortner v. Trustees*, while one of the head notes states the rule to be that "after the dissolution of a partnership, all the partners must unite in a transfer of a partnership security, in order to vest the title in the transferee," it will be seen by an examination of the case that the court only decided that one partner cannot so transfer it, for his own private purposes other than the settlement of and for the benefit of the copartnership.

One copartner, after the dissolution of the firm, may release a debt, and it will be binding on all the late firm (*Pierson v. Hooker*, 3 *Johns.*, 68). He may assign a bond belonging to the firm after the partnership is dissolved (*Colyer on Partn.*, §546). He may lawfully assign a demand due to the partnership, after its dissolution (*Milliken v. Loring*, 37 *Me.*, 408), and if there be no agreement to the contrary, such partner is presumed to have authority to dispose of the partnership *property*, to collect, adjust and pay debts, and give proper acquittances; but to have no power to increase or change the prior obligations of the partners (*Van Kuren v. Parmelee*, 2 *N. Y.* [2 *Comst.*], 525, 526).

It must be conceded, that if Buchan is liable at all, on the covenant contained in the assignment, he is at least liable to the amount of the one tenth of the judgment which was paid thereon when the release of Gillett was obtained; for he covenanted expressly that the whole amount of the judgment remained unpaid, and being liable to that extent, at least, he cannot claim that the

amount collected upon the judgment by the plaintiff should apply for his benefit and in discharge of his obligation for that amount. He transferred the whole judgment, and having covenanted that the whole was due, the plaintiff has the right to apply the amount she collected on the residue of the judgment, and hold him responsible upon the broken covenant to the full extent of the damage occasioned by the breach.

A more serious question is whether the appellant was liable for the whole amount found by the referee.

It must be conceded upon the findings of the referee, that there was no fraud on the part of Buchan;—that he was not aware, at the time when he executed the assignment, of the release of Gillett from the debt, and that he acted upon the transcript of the docket, which was procured and sent to him by the agent of the plaintiff; and if he is liable for the residue of the judgment, it must be because, independent of the covenant or guarantee, the law casts such implied obligation upon him; or because of the terms of the covenant which he executed.

If the terms of the assignment had been general, stating the amount thereof, and containing no covenants, I think the law would imply a warranty, that the whole amount so expressed was due, and that it was due from all the parties against whom it was rendered, if their names were included in the assignment (*Furniss v. Ferguson*, 34 N. Y., 485). But the counsel for the plaintiff does not claim on the argument before us, that that rule applies to this case, and I think it does not, because of the express covenants contained in the assignment.

The right, therefore, must depend upon the language of the covenant itself. The parties have made their agreement in writing, and it contains the whole agreement. It cannot be added to by implication, but must be construed by its terms.

The language of the covenant is, "that there is now due on the said judgment the sum of ten hundred and thirty-eight dollars and forty-six cents, and interest from September 2nd, 1861, and that they will not collect or re-

ceive the same, nor any part thereof, nor release or discharge the said judgment." The counsel for the plaintiff says that this language should be construed the same as if it read, and that they *had not collected or received, &c.*, and "had not released or discharged the same, or *any of the defendants therefrom.*" This proposition is correct so far as it requires the covenant to be understood as if it read, that they had not collected or received any part of it, because that is the clear construction from the language of it, which states that the whole amount is now due. For it could not be all due if any portion of it had been paid by one or more of the judgment debtors. So, too, the counsel is correct in claiming, that it is the same as if it read, that the assignors had not released or discharged any portion of the amount of the judgment, for such is the legal reading of the instrument, as it is ; for if any portion of the amount was discharged the whole amount could not be due. But the real question is, whether the covenant can be construed as such to mean that *none of the debtors had* been released or discharged from it.

It is not necessary to the validity of a release or discharge of one of the copartners of a dissolved firm from a debt or liability of the partnership, that he should have made actual payment of any part thereof to the creditor. It is enough, that for any reason the creditor discharges or releases him in the terms required by the Laws of 1838, ch. 257, and Laws of 1845, ch. 348 ; and it make no difference with the rights or obligations of his associate debtors, whether he obtains the discharge with or without payment, unless such payment exceeds his proportionate part of the whole demand ; for the act of 1838 makes him responsible over to his co-debtors, notwithstanding his discharge by the creditor, to the full amount of his proportionate share, less what he has paid to the creditor, if anything, upon obtaining such discharge.

The judgment might be in force to the full amount against the other debtors, notwithstanding Gillett had been released. And, therefore, the mere fact of his release if he had paid nothing, would not have lessened the

amount of the judgment. It might all be due according to the language of Buchan's covenant. And if nothing had been paid by Gillett, his discharge would not have been a breach of the express terms of it. Now the covenant being in writing, I think if the plaintiff would claim that it should now be read, that none of the judgment debtors were discharged, he should have had it drawn so as to read so when it was executed. The equity of the plaintiff is very weak, upon all the facts of the case, and we should not strain the construction in her favor to enable her to make a large speculation out of one who, upon the proofs of the case, acted honestly and fairly in the transaction. It is enough, I think, that he be held responsible for what, by the terms of the assignment, he assumed; and that will make the plaintiff entirely whole, and leave a large judgment in her hands to be collected of those of the defendants therein who have not been discharged.

If, however, I am wrong in my conclusions on this branch of the case, then I think the rule of damages applied by the referee is the correct one.

But I think that all the plaintiff is entitled to recover is the one-tenth of the judgment, being \$103.84, and interest thereon, from September 2, 1861. And unless the plaintiff elects to reduce her damages to that amount, without costs of appeal to either party, then the judgment must be reversed and a new trial ordered, against Buchan, with costs to abide the event, with the order of reference vacated.

The case also presents pretty strong ground for a new trial, as being upon a report against the weight of evidence. Certainly, upon the evidence returned to us, I should not have hesitated to believe that Bennett, while he was the agent of the plaintiff, and negotiating the purchase of the judgment, did, in fact, have full information that Gillett had been discharged from the judgment, and when we remember that the discharge was entered on the docket against the name of Gillett, and that Bennett himself had access to the book of dockets, and actually procured the transcript upon which the assignment was predicated, it seems to me that he was guilty of gross negligence, in not

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looking under the letter G, as well as that of D. But I have some doubts whether it is our duty to set aside the report on that ground, and am therefore for disposing of the case upon the grounds previously stated.

Judgment accordingly.

*Hollomey
35 Superior 273.*

MALLORY *against* THE TIOGA RAILROAD CO.

Court of Appeals; January Term, 1867.

LIMITATIONS.—TRIAL.—CHARGE.

A foreign corporation cannot avail themselves of the statute of limitations as a defense to an action in the courts of this State.

A letter from A. to B. & Co., and an indorsement thereon by B., relating in direct terms to the letter, bearing the same date, and purporting to be a material and substantial portion of it,—*Held*, to constitute together a contract (the indorsement being carried into the evidence by the introduction of the letter), and that the terms of it could not be contradicted or varied by parol proof.

If, where there is evidence tending to prove a fact, the judge assume in his charge that the fact was proved, a party objecting to such assumption must request to have the question submitted to the jury; if he do not, he will be deemed to have acquiesced in it.

Without such request, an exception to the ruling of the court only brings up the question of law based on such assumption of fact.

Appeal from a judgment.

This action was brought to recover for the transportation of certain property, appertaining to the construction of the defendants' road, in the year 1852, and it was alleged that these services were performed for and at the request of the defendants. Issue having been joined, the case came on for trial before the Steuben circuit in Feb., 1860, and judgment was rendered for the plaintiff. Upon the trial the following features were disclosed :

From 1846 to 1852, the plaintiff was in possession of and operating a railroad between Blossburgh, in Pennsyl-

vania, and Corning, New York. The services for which a recovery was sought, and which consisted of the transportation of iron rails, chairs, spikes, and cross ties, to be used in rebuilding the road of the defendant, were alleged to have been performed in the summer of 1852. It was not denied that such services had been performed by the plaintiff; but it was claimed on the part of the defense that they had been rendered for certain contractors, and the defendants were not liable therefor. It was ruled on the trial that the plaintiff was entitled to recover only for the transportation and distribution of the ties, and the questions relating to this were submitted to the jury.

The evidence whether the ties were carried for the defendants or other parties was conflicting; the testimony of the plaintiff showing that the service was done at the request of Ryerss, Colket and Guernsey, who were president, director and general agent respectively of the defendants' road, and the latter testifying that they had made no arrangement with the plaintiff for performing the work in question.

It also appeared that the plaintiff, prior to April 7, 1852, had operated the defendants' road under written contracts, which were on that day terminated. On that day a new arrangement was entered into, by the terms of which one Bostwick was at liberty to run the defendants' road, until notice given to surrender the same, for the sum of \$25 per day. It was also stipulated that, when the defendants should terminate the lease by notice, the road should be used thereafter for transporting their railroad iron, chairs and spikes; the defendants to pay for, or load and unload the supplies at their own expense, and that the plaintiff, by way of compensation for such transportation, should have the use of the road, without cost, while it was so being used in carrying and distributing the iron.

From the evidence it appeared that the plaintiff did, during the summer of 1852, perform service in transporting the ties, &c., over the road of the defendants, and the agreement of April 7, 1852, was terminated June 14, 1852,

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by a notice to Bostwick and Mallory to deliver possession of the road to the defendants.

The questions relative to the amount of service performed by the plaintiff in the transportation of ties, which he had not been paid for, and whether such service was performed for the defendant or other parties, were submitted to the jury, who found for the plaintiff.

The general term affirmed this judgment, whereupon an appeal was taken to this court.

Charles W. Reynolds, for the defendants, appellants.

BOCKES, J.—The plaintiff claimed to recover in this action for transporting and distributing cross ties, iron rails, chairs, and spikes, along the line of the defendants' road, intended for use in its reparation. But the justice at the trial limited the right of recovery to the transportation and delivery of cross ties only, holding that the rails, chairs, and spikes were transported and distributed under an agreement with the plaintiff and Bostwick, that that service was to be without charge, in consideration of the free use of the defendants' road during the period of transportation.

The question now is, whether the recovery by the plaintiff for the transportation and distribution of the ties can be sustained. At the close of the evidence the defendants' counsel requested the court to direct a verdict for the defendants, on the ground that the evidence was insufficient to enable the court or jury to determine the extent or amount of plaintiff's claim for services; and also asked the court to rule that the plaintiff's claim was barred by the statute of limitations.

The learned judge before whom the trial was conducted properly declined compliance with these requests. The point in regard to the statute of limitations is not now urged. It seems that the services were rendered in June, July, and August, 1852, and this action was commenced July 17, 1858, less than six years from the termination of the services. Besides, the defendants are a foreign corporation, and consequently cannot avail themselves of the

statute of limitations (*Olcott v. Tioga R. R. Co.*, 20 *N. Y.*, 210).

Nor could the judge have properly directed a verdict for the defendants on the ground that the evidence was insufficient to enable the court or jury to determine the extent or amount of the claim. There was evidence that the plaintiff performed the services, and also evidence as to its value. The extent of the services and the amount to be allowed, therefore, were subjects for the consideration of the jury. In such case the court can neither nonsuit the plaintiff nor direct a verdict for the defendants (*Van Rensselaer v. Jewett*, 2 *N. Y.* [2 *Comst.*], 135).

There was evidence given, showing that the transportation of the rails, chairs, and spikes was provided for in a lease of the road to Bostwick and the plaintiff, wherein it was agreed that the transportation of those articles was to be without charge, in consideration of the use of the road during the period of transportation.

The contract of lease was evidenced by a letter from the president of the road to Bostwick and Mallory, and an indorsement thereon by Bostwick. The defendants' counsel offered to prove the term of the lease by parol. This was excluded on the ground that the agreement appeared to be in writing. The letter and the indorsement thereon should be read together. The letter had been put in evidence, and carried with it the indorsement, which, in the absence of any explanatory proof, must be deemed to constitute a part of the paper on which it was written; especially as it related in direct terms thereto, bore the same date, and purported to be a material and substantial part of it. Read together, the papers evidenced a perfect contract, the terms of which of course could not be contradicted or varied by parol proof. The offer was, therefore, properly overruled.

The purpose of the evidence offered doubtless was, although not stated, to show that it was agreed that the ties, as well as the rails, chairs, and spikes, were to be transported without charge. If so, it was an attempt to introduce into the written contract a new condition, changing

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its import and effect in a very material sense—hence inadmissible.

In regard to the defendants' set-off, the learned judge held that the evidence showed that the claim was settled, or if not settled, that it was barred by the statute of limitations.

There was evidence tending to prove, if not definitely and clearly proving, that the defendants' claim interposed as a set-off was settled. The judge assumed, when called upon to speak on that subject, that the fact stood proved.

If dissatisfied with such assumption, the party should have requested to have that question submitted to the jury. In the absence of such request, the party will be deemed to have acquiesced in the assumption of facts stated by the court (*Barnes v. Perine*, 12 *N. Y.* [2 *Kern.*], 18, 23; *People v. Cook*, 8 *N. Y.* [4 *Seld.*], 78; *Dows v. Rush*, 28 *Barb.*, 157, 180; *Nolton v. Moses*, 3 *Barb.*, 31; *Winchell v. Hicks*, 18 *N. Y.*, 553). If dissatisfied with the conclusion of fact stated by the judge, the party should ask to have the question submitted to the jury. Without such request, an exception to the ruling of the court only brings up the question of law based on his assumption of fact.

As the case is here presented, it must be deemed to be an accepted fact, as stated by the judge, that the defendants' claim for set-off had been settled; hence it could not be allowed in this action. I will add, however, that the facts proved fully justified the conclusion expressed by the learned judge on the trial, and it is equally clear that the claim was barred by the statute of limitations.

But the views above expressed render further examination of the case unnecessary.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

NORTHROP *against* SYRACUSE, &c. RAILROAD COMPANY.*Court of Appeals; March Term, 1867.*

CARRIER.—TERMINATION OF LIABILITY.—ABSENCE OF CONSIGNEE.

Where the consignee is absent from the terminus of the carrier's route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier, by depositing the merchandise in a warehouse; although it is otherwise of an intermediate carrier, whose duty it is to deliver to the next carrier on a road beyond.

Appeal from a judgment.

The facts are stated in the opinion.

Henry R. Mygatt, for the plaintiffs and appellants.—

I. The defendants' special responsibility did not terminate by the mere deposit in their own warehouse. Two of the justices of the court below concurred in the Massachusetts rule, that such liability ceased when the goods were discharged from the cars and placed in the defendants' warehouse. A rule more just, which is deduced from the principles of the common law, has prevailed in this court (*Ladue v. Griffith*, 25 *N. Y.*, 368). In a recent case this court stated that the doctrine maintained in the Massachusetts cases was in conflict with the views thus expressed, and to that extent they have not concurred therein (*McDonald v. Western R. R. Corp.*, 34 *N. Y.*, 503).

II. The liability of the defendants, as common carriers, had not ceased at the time of the fire which consumed the wheat. (1.) The duty of the railroad company to deliver the wheat could not be discharged until the unloading thereof in a suitable place at the end of the carrier's route, for removal by the consignees; and notice to the latter of the arrival of the goods and the readiness of

the carriers to deliver; and the lapse of a reasonable time after such notice to give the plaintiffs opportunity for removal. (2.) In support of the principle that the discharge of the carriers' liability was contingent upon the giving and receipt of notice, the counsel cited and commented upon the opinions rendered in the general term of the court below; the opinion of Justice ALLEN, in *Cary v. Cleveland & Toledo R. R. Co.* (29 *Barb.*, 45); the decision of Justice BRONSON in *Hollister v. Nowlen* (19 *Wend.*, 241; 2 *Kent Com.*, 608; 2 *Pars. on Cont.*, 5th ed., 189, 190; *The Mary Washington v. Ayres*, 5 *Am. Law Reg. N. S.*, 692). (3.) The law of this court is in harmony with those wise maxims of public policy and convenience upon which the common law liability of the carrier is said to rest. It is well settled that where goods are shipped to pass through the hands of several intermediate carriers before arriving at their place of destination, the duty of each is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond; and that such an intermediate carrier does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to the next carrier (*McDonald v. Western R. R. Co.*, 34 *N. Y.*, 497, and cases there cited). The principles enunciated in these cases may be regarded as decisive where the delivery, as in the case at bar, was at the end of the route (See, also, *Price v. Powell*, 3 *N. Y.* [3 *Comst.*], 323). In *Ladue v. Griffith* (25 *N. Y.*, 368), the court say: "When a carrier deposits property in his own warehouse, at some intermediate place in the course of his own route, or at the end of the route where it is his duty to deliver it to the owner, his duty, as carrier, is not completed, and he will remain liable as carrier for any loss for which common carriers are ordinarily responsible." This opinion by SMITH, J., was concurred in by Justices DAVIES, WRIGHT, SELDEN, and SUTHERLAND. (4.) The rule of strict responsibility which the common law attaches to carriers, has not been relaxed in this court. The consignee cannot attend at the precise moment when

his goods arrive, to receive and take care of them. At the earliest possible time plaintiffs sent for their wheat. Greater diligence has not been exercised by the intermediate carriers in the cases cited. From analogy to this rule, and according to the reason on which the liability of carriers is founded, can a railroad company be discharged without actual delivery, without notice of the arrival, and without the possibility that the consignee, without any diligence, can obtain his goods? (5.) The defendants were at first common carriers, and subsequently warehousemen for hire. (6.) What is reasonable time is a question of law (2 *Pars. on Cont.*, 661; *Porter v. Blood*, 5 *Pick.*, 54; *Darbyshire v. Parker*; 6 *East*, 3; 1 *C. B. N. S.*, 114; *Hales v. London & North-western Railway Co.*, 4 *Best & S.*, 71). The plaintiffs were not bound to any greater diligence than reasonable convenience in sending for their goods.

III. As this is a case agreed upon without action, the judgment should be reversed and directed to be entered absolute for the plaintiffs for \$66.32, with interest from Aug. 22, 1859, with costs.

S. S. Davis, for the defendants and respondents.

DAVIES, CH. J.—The defendants were common carriers, and agreed to transport for the plaintiffs a certain quantity of wheat from Tully, in the county of Onondaga, to Chenango Forks, and which was duly transported by the defendants upon their railway from Tully to Chenango Forks. Said wheat was in twenty-two bags, and directed to the plaintiffs at Chenango Forks, at a place called Chester Village. It appears that no one being present to receive said bags of wheat on their arrival at their place of destination, the said bags of wheat were deposited by the defendants in their freight-house at Chenango Forks, at four o'clock in the afternoon of the 8th of August, 1859; that the plaintiffs, on the afternoon of the ninth day of August, 1859, received notice that said bags of wheat had been sent from Tully to Chenango Forks;

said bags of wheat were destroyed by fire before the actual delivery thereof to the plaintiffs, on the night of the 9th of August, at about eleven o'clock; and that the plaintiffs sent for said bags of wheat on the tenth day of August.

The precise point presented for adjudication in this case was decided by the supreme court of this State more than twenty years since (*Fisk v. Newton*, 1 *Den.*, 45). In that case the court said: "So when goods are safely conveyed to the place of destination, and the consignee is dead, *absent*, or refuses to receive, or is not known and cannot after due efforts are made be found, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business, at the place of the delivery, for and on account of the owner. . . . The risk of the carrier ceased on the delivery of the goods in store." This seems to be the well-recognized rule, where the goods are carried to the point of ultimate destination—the place of delivery to the consignee (*Thomas v. Boston & Providence R. R. Co.*, 10 *Metc.*, 472; *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 *Gray*, 263). The case of *Fisk v. Newton* is cited approvingly by JOHNSON, Ch. J., in *Goold v. Chapin* (20 *N. Y.*, 259); and the doctrine there enunciated is repeated and reaffirmed in the same case by STRONG, J. He says: "It is not intended to decide that common carriers can in no case change their peculiar responsibilities, while they retain possession of the goods confided to them. They may not be able with due diligence to find any one to receive the goods in behalf of the owner, and there may not be any safe place of deposit within their reach, and in such case their duties as carriers would end, and they would then become mere ordinary bailees. They may also deposit the goods in their own warehouse, and thus absolve themselves from any further responsibility as common carriers. That, however, can only be where there has been a failure by the owner or his agent to receive them."

These views are specially pertinent to the case now

under consideration. There the carrier, as carrier, had performed his whole duty as such. The goods had securely arrived at their place of destination. The consignee was absent, residing some fifteen miles distant. He had no agent to whom delivery could be made, or to whom notice could be given. Can the consignee, by his neglect of duty in this regard, continue the strict liability of the carrier until it shall suit his convenience or pleasure to call for the goods? I think not, and that the carrier can properly do what he did in this case—deposit the same in a freight-house—and that then his strict liability as carrier ceases. This court said, in the case of *Goold v. Chapin*, that the carrier could do this, and then absolve himself from any further responsibility as common carrier. It is a misapprehension to suppose that any contrary doctrine has been enunciated by this court. A brief review of the cases will show this. In *Goold v. Chapin* (*ubi supra*) the goods were delivered to the defendants in New York, to be carried to Albany, and there to be delivered to another carrier, to be transported to Brockport, N. Y.; and the parties to whom the delivery was to be made at Albany, were to receive the goods not as owners, but as carriers. Instead of delivering the goods to the carrier, who was further to transport them, or depositing them in a warehouse until called for by the carrier, the defendants placed them upon a float, where they remained for several days, until consumed by fire. And HUNT, J., in his opinion in *McDonald v. Western R. R. Co.* (34 N. Y., 497), correctly states the point decided, thus: "This court held that the defendants were liable as carriers; that the notice to the Atlantic line, and their unreasonable neglect to take the goods, did not exempt them; that, to exempt themselves, the carriers must store the goods in a warehouse, or in some other way clearly indicate a renunciation of the relation of the carrier;" and he adds, "The court held that, as there was neither a deposit in a warehouse, which would have indicated clearly a renunciation of the carrier's liability, or a delivery to the carrier by canal,

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which would have fulfilled the duty of the first carrier, the defendants were liable." In *Ladue v. Griffiths* (25 N. Y., 364), the facts were that a warehouseman at Buffalo, who was also a carrier on the Erie Canal, used to receive freight from the West and forward it to the East by the first boat going, whether his own or that of other carriers. He received goods shipped from Detroit, addressed to his care at Buffalo, and marked to go from "Buffalo to East Albany, at 30 cents per 100 lbs." The presumption, from these facts alone, this court held, was, that the goods came to his possession as a carrier, and having been burned without his fault, while in his warehouse awaiting transportation, he, was liable for their value. This decision was placed on the distinct ground that public policy, in this country of long routes and frequent transshipment, forbids any intendment which would favor an intermediate carrier in divesting himself of that character, and assuming the more limited responsibility of a forwarder. In *McDonald v. Western R. R. Co.* (*ubi supra*) it was held that "where goods were shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond. That an intermediate carrier, in such case, does not relieve himself from liability by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery, or notice to, or any attempt to deliver to, the next carrier."

These cases are all based upon the controlling fact, that the carrier in whose custody the property was destroyed was an intermediate carrier, and that in no instance had the goods reached their ultimate destination. That such intermediate carrier could not change the character of his liability by a deposit of the goods in a warehouse. But not one of these cases infringe upon the doctrine of *Fisk v. Newton*, but on the contrary, recognize it as sound law. We think the rule laid down in this lat-

ter case is controlling upon that now under consideration, and that upon the circumstances discussed in this case, the liability of these defendants as common carriers ceased when they safely transported the property in question to the point agreed upon, and that the consignees being absent at the time of its delivery, and they having no agent there to receive the same, or to whom it could be delivered, or to whom notice of its arrival could be given, it was the duty of the carrier, and his whole duty, to deposit the same in a warehouse, and therefore these defendants ceased to be liable as common carriers.

The judgment appealed from should be affirmed, with costs.

BOCKES, J.—The parties made and presented a case to the supreme court for adjudication, without action, pursuant to section 372 of the Code of Procedure. Judgment was ordered for the defendants, and the plaintiffs appealed to this court.

The case agreed upon by the parties discloses the following facts: The defendants, on the 8th of August, 1859, received from the plaintiffs, at Tully, for transportation, twenty-two bags of wheat, directed to them at Chenango Forks. The property arrived at the latter place on the same day, and was, at 4 P. M., placed in the defendants' freight-house, where it remained, without actual delivery to the plaintiffs, until the next succeeding evening, when, at about 11 o'clock, it was, with the freight-house, destroyed by an accidental fire. The plaintiffs were merchants and millers; and resided at Centre Village, fifteen miles from the depot at Chenango Forks. They received notice that the wheat had been sent forward from Tully to the Forks on the afternoon of the 9th, and sent for it on the following day, when they learned that it had been destroyed by fire the evening previous.

The question is whether, on the facts stated, the defendants were discharged from their liability as common

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carriers. It seems they had conveyed the property safely to its place of destination, and, no one being there to whom they could make delivery, it was deposited, according to the usual course of business, in the freight-house. While the defendants were bound to deliver the property according to the usual course of trade or business, they were not required to go or send to the plaintiffs' residence, fifteen miles away, either to make delivery there or to notify them of its arrival. Having transported it safely and with reasonable despatch to the place of destination, and having held it there uninjured for a reasonable time, ready for delivery, the carrier was absolved from liability, as such, in a case like this, where the party resided at a distance, and had no agent at the place to whom notice of its arrival could be given. According to the decisions in Massachussetts, railroad companies, as common carriers, are discharged when they have transported the goods safely and with diligence to the place of destination, and deposited them in their warehouse, after a reasonable time has elapsed for the owner or consignee to examine them and take them away (1 *Gray*, 263; 10 *Metc.*, 472); and it was held in these cases that carriers (railroad companies) were not bound to give notice of the arrival of the goods. In the latter case above cited, it was said that railroad companies, from the nature of their business and from the means employed, could not deliver goods at the warehouse of the owner, when situated off the line of the road, as a common wagoner could do; but when they had transported the property safely to the place of destination, and stored it safely in their depot, or warehouse, their duty as common carriers terminated. In this State, however, it would seem to be requisite that notice of its arrival should be given to the consignee, in case he resides or has a place of business at the place of destination, or in its immediate vicinity. But it is not necessary here to consider the question whether the liability of a railroad company, as common carriers, continues until they notify the consignee of the arrival of the goods, and until a rea-

sonable time thereafter has elapsed to remove them, in a case where the consignee resides at the place of consignment, or has an agent there to receive them. The facts in this case do not raise this question. The rule is, stated in general terms, that the common carrier is bound for the diligent and safe transportation of the goods, and for their delivery to the owners or consignees, according to the usual course of business and the nature of his contract. If there be no person at the place of destination to receive the goods, it is enough that they are placed on deposit in a warehouse, and after a reasonable time has elapsed for their examination and removal, his liability as carrier ceases.

The application of these principles to the case before the court will exonerate the defendants from liability. The property had arrived at its place of destination in safety, and had remained in the freight-house uninjured one full day and part of another. It had not been called for, nor did the owner and consignee reside in the vicinity. It was placed safely in deposit for the owner, and remained so sufficiently long for examination and delivery. Its destruction after that period by an accidental fire, created no liability against the defendants.

The judgment appealed from should be affirmed with costs.

All the judges concurred.

Judgment affirmed.

BLATCHFORD *against* ROSS.*Supreme Court, First District; Special Term, Feb., 1869.*CORPORATIONS.—ARTICLES OF ASSOCIATION—PARTIES.—
RECEIVER.

A clause in the original articles of association of a company, prohibiting the union or consolidation of that company with any other, without the consent of a majority of the stockholders, is not controlled by a clause contained in those articles, providing for an amendment of the original articles by a concurrent vote of two-thirds of the executive committee and a majority of the trustees, so as to allow such officers to repeal the restriction upon consolidation. Such authority to amend extends only to such amendments as are pertinent to the business and objects for which the association was organized.

It is no objection to the continuance of an injunction to restrain one company from uniting and consolidating with another company, that the latter company, or that the stockholders severally, are not made parties.

An executive committee of a company have no right to vote moneys to themselves, in addition to their regular compensation, for extra services previously rendered, or in consideration of their retirement; and a receiver will be appointed to recover back such moneys for the benefit of the company.

Motion to continue an injunction.

Theron R. Strong and Elliot F. Shepard, for the plaintiff, in support of the motion.

Robert Sewell, Charles A. Rapallo, and George F. Comstock, for the Merchants' Union Express Company.

Theodore M. Pomeroy, for the trustees.

Hooper C. Van Vorst and John K. Porter, for the consolidated company.

INGRAHAM, J.—This action is brought (by James W. Blatchford against Elmore P. Ross and others) to restrain the defendants, who are officers of the Merchants' Union Express Company, and that company, from carrying out a proposed union and merger of the company with the American Express Company in the American Merchants' Union Express Company, and for the appointment of a receiver. An injunction was granted restraining them from making, carrying into effect, or completing any merger or consolidation of the Merchants' Union Express Company with any other company, restraining them from transferring any property to the new company or to any other company, and the new company from receiving any moneys or property from the other corporation, and from enforcing and collecting an assessment on the stock of the Merchants' Union Express Company, which was alleged to be for the purpose of carrying out such consolidation. The injunction also contained some other provisions, which were afterwards modified so as not to interfere with the business of the new company during the litigation. A motion is now made to make such injunction permanent during the pendency of this action. The main question as to the validity of the proposed consolidation depends upon the construction of the articles of association and the power of executive committee in altering the same.

I have not been furnished with a copy of the original articles of association, but I gather from the pleadings that the original articles of association did not allow the union or consolidation of the company with any other, without the consent of a majority of the stockholders. That these articles contain a clause providing for an amendment of the original articles by a concurrent vote of two-thirds of the executive committee and a majority of the trustees. That by a concurrent vote of the committee and of the trustees, the articles of association were amended so as to provide that the Merchants' Union Express Company might be merged into or consolidated with any other Express Company, on obtaining the written

consent of a majority in interest of the stockholders. That afterwards, by a similar proceeding, the articles of association were again amended so as to provide for such merger or consolidation, without requiring the previous consent of such majority of stockholders. And that, in pursuance of such amendment, the consolidation of the American and Merchants' Union Express Companies was resolved upon by the trustees and executive committee, without any knowledge or assent of the great body of the stockholders until after such resolution was adopted.

The authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. Such authority to amend must be construed as intended for such amendments as were pertinent to the business and objects for which the association was organized. As well might the executive committee, under the power of amendment, assume to change the business of the corporation to one entirely different from that for which it has been organized, as to terminate the existence of the association and merge it into another. Such was not the object of the original articles. No such provision was contemplated ; and to guard against it the stockholders had expressly provided that their consent should be necessary before any such change could be effected. At any rate, such were the views entertained by the executive committee when the consolidation was first thought of, and in the first amendment the consent of a majority of the stockholders was deemed necessary, but no amendment was contemplated inconsistent with, contrary to, or destructive of the main objects of the association, and when the executive committee so extended their power they exceeded their authority. They had no authority by such a consolidation to bring the stockholders under the increased liability for the debts of another company, and expose them to "loss" which might not have existed before, or which might follow from the introduction of a new company or association, and a surrender

to such new company of all the property of the association. Thus in the case of private associations the unanimous voice of the stockholders was regarded necessary to change its provisions (*Livingston v. Lynch*, 4 *Johns. Ch.*, 573); and even an act of the legislature was held insufficient to compel a change of business in a corporation from what was originally contemplated, without the consent of the stockholders (*Hartford & New Haven R. R. Co. v. Croswell*, 5 *Hill*, 383). In the case of *Church v. Financial Corporations* (5 *Eng. L. & Eq.*, 450), it was held that an agreement for amalgamation with another company was not within the power of the directors, although the articles authorized the directors to amalgamate with any company formed to carry on any business included in the objects of the company, in a case in which an assessment was made upon its stockholders for the purpose of carrying out the amalgamation. In *Imperial Bank of China v. Bank of Hindostan*, it was held that under the provisions of act of 1862 (requiring assent of stockholders), an arrangement for the transfer of the business of the company to another, and providing for an assessment on the shareholders, was not valid, and that assessment of the shareholders must be by all the members (6 *Eng. L. & Eq.*, 91). It is proper, however, to add that although the last two cases referred to are controlled by the provisions of a statute somewhat differing from any statute in this State, the general principles in both cases may be well applied to the case under consideration. Upon this branch of the case I think it is clear that the proposed merger of the company, in another, without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors, and if the union had not been substantially executed by a transfer of property, and by a large number of the stockholders, it should be enjoined until the final hearing of the case. So far as the transfer of the property has been made, no benefit will accrue to any of the parties to have the new company enjoined from its use, or from receiving

from any of the stockholders of the Merchants' Union Express Company a surrender of the stock held by them to the new company, and a voluntary compliance with the terms of the agreement on their part. If the stockholders who have not yet accepted of the terms so agreed on between these companies elect so to do, and to become stockholders in the new company, there is no good reason for restraining them from so doing, but in regard to property not delivered, the injunction should be continued, and the directors and executive committee should be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other shareholders, who are not willing to become members of the new company, by collecting the assessments on the shares of the stock, or in any other manner, till the decision of this case.

It is objected, however, to a continuance of this injunction, that the American Express Company, and the stockholders severally, are not made parties. That company is not in any way interfered with by these proceedings. Their stockholders are free to become members, and that company is not enjoined from any disposition of its property that may be desired by its managers. The interest of the company, if any, is so remote that it affords no grounds for relief to the plaintiff. Nor is the want of making all the stockholders defendants a good objection. Where they are as numerous as they are in this case, it is not necessary. It is enough if some of the class are parties, who, on behalf of all, may either prosecute or defend. The plaintiff here represents one class, and sues for himself and others who choose to come in, and who have not become stockholders in the new company. The defendants represent the executive committee and directors, who are in favor of the union of the companies, and can litigate for the benefit of the other class. Even if it were otherwise, the means provided for bringing in other parties are such that relief by a temporary injunction should not on that account be denied.

The other branch of this case relates to the appoint-

ment of a receiver. This is based mainly on the alleged misconduct of the executive committee in voting for appropriations of money to themselves and others for services at various times during the past two years, before and after the organization of the company. These votes are shown by extracts from the minutes of the committee, which at least exhibit very liberal appropriations of the money of the stockholders for their own benefit, large amounts of which are said to be for services prior to the organization of the company. The impropriety of voting such moneys to themselves for extra services is shown by the case of *Gardner v. Ogden*, 22 *N. Y.*, 332, and *Butts v. Wood*, 37 *Id.*, 317). Thus, in April, 1866, \$500 monthly was voted to each of the executive committee and others, which in August was increased to \$700 monthly, to commence on January 1, 1866. In April, 1867, \$2,500 was voted to each member of the committee, as compensation for services rendered the company. In May, 1867, an advance was voted to Joslyn & Co. of \$25,000 to protect the interests of the company from assaults made by other express companies, and in September, 1867, a further sum of \$40,000. In May, 1866, \$5,000 was voted to each member of the committee annually, which in September was reduced to \$2,500. In October, 1867, \$8,000 was voted to each member of the committee for services for 1866 and 1867, and to be for services in organizing the company. And in December, 1867, to each member of the executive committee and the attorney of the company \$50,000 for services prior to the organization of the company, in devising ways and means by which the company might be formed, &c., upon condition that each member immediately invest the same in the stock of the company. In May, 1868, the last resolution was repealed, and the treasurer was directed to cancel the indorsement of \$50,000 on the checks of the executive committee, in pursuance of the former appropriation, but whether the stock was or was not issued to the executive committee under that resolution does not appear. In May, 1868, a loan to C. T. Backus of \$20,000, on his notes, for which

no cause is stated in the resolution. In May, 1868, a resolution was passed directing the issue to two of the executive committee of 750 shares of stock, and to another of 500 shares, in consideration of their retiring from the executive committee, and as compensation for services, as promoters and originators of the company, in addition to compensation previously received. These resolutions were all passed by the executive committee in their own favor, and it is claimed by the plaintiff, that such resolutions are void, and that a receiver is necessary to recover back the same for the benefit of the company. Of the impropriety of grants of such large sums for such purposes there can be little doubt, and in the condition in which this company, the Merchants' Union Express Company, is now placed, there can be no impropriety in deciding in favor of the appointment of such receiver.

A receiver was appointed some time since in regard to the property of the company, not involved in the consolidation of the company with the new express company, and the plaintiff has an order allowing him to be made a party to this suit. The order restraining him from parting with any of the funds received by him will protect the plaintiff as fully as if a new receiver were now appointed; and it is but proper that he should be heard after he is brought in as defendant, before any order for a new receiver is made. For this reason, therefore, I reserve any order on this branch of the case until after the receiver has appeared and answered; the plaintiff may then renew such application in such way as he may be advised.

Objections have been made to the right of the plaintiff to take these proceedings, because he is the holder of stock purchased from one who had assented to the consolidation, and because he had delayed in bringing this action until after the consolidation was partially effected.

If this action was solely for the purpose of preventing the consolidation, there would be force in these objections, but this action is for other purposes. Under the excep-

tion as to the consolidation as above suggested, those stockholders who are willing to do so, will be allowed to become stockholders in the new company, and their rights are not interfered with. As to the others, they may have a right to claim from the remaining funds of the company their share of the interest they have in the stock, and to have the right of the appropriations heretofore referred to inquired into through a receiver, for such purposes. These objections are in no way applicable in opposition to maintaining this action.

Nor is the want of parties as to the American Express Company, or the other stockholders, any ground of objection.

That company is only interested in carrying out the consolidation, and the same is not interfered with by the injunction, and the other stockholders are not necessarily parties, when they are so numerous, and when they are represented by sufficient of their class to defend the action on their behalf.

The injunction therefore is retained as originally modified, with the further modification in permitting such of the stockholders as so claim to exchange their stock for that of the new company, and to pay the assessment thereon, and reserving any decision as to receiver, until after the present receiver shall be made a party, and shall file an answer in this action.

MITTNACHT *against* KELLY.*Court of Appeals ; March Term, 1867.*

CHATTEL MORTGAGE.—VALIDITY OF LEVY.

A chattel mortgage upon the merchandise and stock in trade of the mortgagor, expressed to include "the increase and decrease thereof," is wholly void.

Property embraced in the mortgage, although not a part of the stock in trade which was the subject of the increase and decrease spoken of, is not protected by the mortgage, and may be levied on under a judgment against the mortgagor.

Appeal from a judgment.

This action was brought by George M. Mittnacht against John Kelly, sheriff of the city and county of New York. The facts are stated sufficiently in the opinion of the court.

———, for the plaintiff and appellant.—I. The mortgage in question was not void upon its face as against the execution creditor in this action. (1.) The mortgage was founded upon a good and valuable consideration, namely, an advance of money. (2.) Leaving the possession of chattels in the hands of the mortgagor is not necessarily fraudulent (*Thompson v. Blanchard*, 4 *N. Y.* [4 *Comst.*], 303). (3.) From the testimony it appears that the motives of the parties to the mortgage were fair and honest, and that the mortgage was founded upon a valuable consideration. Such testimony is sufficient to repel the presumption of fraud, arising from want of change of possession (*Levy v. Welsh*, 2 *Edw. Ch.*, 438). (4.) The mortgage may have been void with respect to after-acquired property, and valid as to that which the mortgagor owned, and was entitled to incumber (*Van Heusen v. Rodcliff*, 17 *N. Y.*, 580 ; *Gardner v. McEwen*, 19 *Id.*, 123).

(5.) The mortgage was, therefore, valid as to all the property described in the complaint.

II. Default having been made by the mortgagor before the recovery of the judgments set up in the answer, the mortgagee became the absolute owner of the property in question, and the mortgagor ceased to have any interest therein, which could be the subject of a levy under an execution (*Stewart v. Slater*, 6 *Duer*, 83, 96 ; *Mattison v. Baucus*, 1 *N. Y.* [1 *Comst.*], 295).

III. The court below erred in dismissing the complaint. (1.) The mortgage was lawful on its face. There was proof that the debt which it was given to secure, was fairly and honestly owing by the mortgagor to the mortgagee ; and that the mortgage had been filed in pursuance of the statutes. (2.) Any supposed indications of fraud, therefore, arising from the possession of the goods, and the conduct of the parties respecting them, should have been determined by the jury (*Gardner v. McEwen*, 19 *N. Y.*, 123).

A. J. Vanderpoel, for the defendant and respondent.—

I. The mortgage was void upon its face as against creditors. The schedule showed that the parties contemplated the use of the property in the ordinary business of the mortgagor. It covered the “increase and decrease thereof,”—words which are susceptible of only one meaning or construction, when considered in connection with the nature of the property and the business. In the language of *DENIO, J.*, “It was not intended to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold, and to take in what should be newly purchased.” The manifest tendency of such an arrangement is to defraud creditors by giving to the mortgagor a false credit, and is incongruous with the just and legal idea of a mortgage (*Edgell v. Hart*, 9 *N. Y.* [5 *Seld.*], 217, 219).

II. The fact that default had been made in the payment of the mortgage debt when it was demanded, there being no change of possession, did not give the plaintiff

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an absolute title to the property, or strengthen it as against the judgment and execution under which the defendant acted (*Ely v. Carnley*, 19 *N. Y.*, 496).

PARKER, J.—The defendant was sued in the court of common pleas of the city of New York, for levying upon a horse, wagon, and harness which the plaintiff claimed under a chattel mortgage, which had been executed to him by the execution debtor. The mortgage was given August 12, 1859, and the execution was issued September 27, 1859. Joseph Zorn, the mortgagor, carried on a family grocery store in Third-street, in the city of New York. By the terms of the mortgage schedule, he mortgaged, in addition to the property in controversy, “the whole stock of trade in goods, wares, and merchandise, the whole concern forming my grocery and liquor store, known as number 93 Third-street in the city of New York, *with the increase and decrease thereof*,” &c., and, until default in the payment of the money secured, the mortgagor was “to remain and continue in the quiet and peaceable possession of the goods and chattels, and the full and free enjoyment of the same.”

Upon the trial the court dismissed the complaint upon the ground that the mortgage was void upon its face, as against the execution creditor, and judgment was entered for the defendant. The general term affirmed the judgment; and the only question brought by the appeal to this court is, whether the mortgage is void upon its face.

The mortgaging of the whole stock in trade, the whole concern forming the grocery and liquor store of the mortgagor, *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock by way of mortgage, the mortgagor making purchases from time to time, and selling off in the ordinary manner; the intent being not to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold, and take in what

should be newly purchased. This is just such an arrangement as was held in *Edgell v. Hart* (9 N. Y. [5 *Seld.*], 213), to render the mortgage void. This case cannot be distinguished from that, and the law as pronounced in that case must be held applicable to this.

True, in this case the horse, wagon, and harness in question, did not constitute part of the stock in trade, which was the subject of the "increase and decrease" spoken of; yet if, as to the stock in trade, the mortgage was fraudulent as against creditors, that fraud infected the whole mortgage, and it is wholly void void (*Goodrich v. Down*, 6 *Hill*, 438; *Mackie v. Cairns*, 5 *Cow.*, 547, 580; *Grover v. Wakeman*, 11 *Wend.*, 187, 225).

I am of opinion, therefore, that the judgment appealed from should be affirmed.

Judgment affirmed.

THE NATIONAL FIRE INSURANCE COMPANY against McKay.

Superior Court of Buffalo; General Term, Dec., 1867.

RES ADJUDICATA.—COVENANT TO DEFEND.—FORECLOSURE AND SALE.—ESTOPPEL.—SALE FOR TAXES.

A judgment is not conclusive, as *res adjudicata*, upon one who is neither a party nor privy.

When one, by the nature of his covenant, is bound, upon the request of his covenantee, to defend an action against the covenantee, a notice to defend makes the judgment subsequently recovered against the covenantee, when interposed in an action by him upon the covenant, conclusive evidence, against the covenantor, of its breach; but it does not make the covenantor a party or privy to the judgment against the covenantee.

A judgment and sale, in an action to foreclose a mortgage, to which the owner of the lands is not a party, is a nullity. The owner of lands, which have been held adversely to him, under such a judgment and sale,

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for more than ten years, is not within the ten years limitation of section 52 of title 2 of chapter 4 of part 3 of the Revised Statutes.

A mortgagor, without covenant or representation, is not estopped from showing what estate he had in the mortgaged lands at the time of the delivery of the mortgage.

How lands are to be sold for taxes, and upon whom notice to redeem must be served.

Exceptions.

This action was brought against James McKay. It was in the nature of an ejectment.

Upon the trial before Justice CLINTON and a jury, the following facts appeared.

On the 20th of November, 1838, the defendant McKay executed a mortgage upon the lands in question to one Oakley to secure the payment of \$10,000, which was duly recorded. Oakley assigned said mortgage to the plaintiff. On March 20, 1840, McKay conveyed by deed the lands in question to one Burwell, which deed was not recorded until July 8, 1841. In December, 1840, the plaintiff filed his bill in chancery to foreclose said mortgage.

The said *Burwell* was not a party to that action.

The usual decree of sale and foreclosure was entered in February, 1842. In April, 1842, the said lands were, by virtue of said decree, sold and conveyed by a master to the plaintiffs.

The master's deed was recorded in June, 1842. In June, 1847, the plaintiffs conveyed the lands in question with warranty to one Savage, who at the same time executed to the plaintiffs a mortgage on the lands to secure part of the purchase money.

In 1847 Savage executed and delivered to McKay a deed of said lands, subject to his, Savage's, mortgage to the plaintiffs.

In February, 1852, one Steele, claiming a tax title to said lands, brought ejectment for them against one Bennett, the tenant of McKay. McKay gave notice to the plaintiff to defend the action, which the plaintiff neglected to do.

McKay defended the action, but judgment was rendered therein in favor of Steele, in July, 1852, and Bennett was put off by a writ of possession.

In July, 1852, the plaintiffs brought an action to foreclose the mortgage of Savage to them, and made McKay a party. *Burwell was not a party.* The usual judgment of foreclosure and sale was entered in that action in September, 1856, and in January, 1862, the lands were sold under that judgment, and conveyed to the plaintiffs. The said Steele, in July, 1858, executed a deed to McKay of said lands, and upon the trial evidence was given to establish a tax title in Steele.

In August, 1865, Burwell executed a deed of the said lands to McKay. Neither mortgage contained any covenants.

The judge directed a verdict for the plaintiffs, and the defendant McKay excepted.

J. L. Talcott, for the defendant, appellant.

S. S. Rogers, for the plaintiffs, respondents.

MASTEN, J.—The judgment in the action of ejectment, brought by Steele against Bennett, is not evidence in this action of the *validity* of Steele's title to the premises in question. (1.) The parties to this action are not parties nor privies to that judgment. (2.) The judgment is not upon verdict (2 *Rev. Stat.*, 209, § 36; *Ryers v. Rippey*, 25 *Wend.*, 431; 4 *Hill*, 468; *Christie v. Bloomingdale*, 18 *How. Pr.*, 12; *Bay v. Gage*, 36 *Barb.*, 447; *Kimberly v. Patchin*; *Dutchess of Kingston*, 2 *Smith L. Cas.*, 424).

It was sought upon the argument, to give an extraneous effect to the judgment in *Steele v. Bennett*, by force of the plaintiffs' covenant in the deed to Savage, and of the notice to the plaintiff to defend that action. It is well settled that, where one, by the nature of his covenant, is bound, upon the request of the covenantee, to defend an action brought by a third person against the covenantee, in respect to the subject of the covenant, that the covenantee may throw upon the covenantor the burden and

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risk of the litigation, by giving to him proper notice and opportunity to defend the suit. The burden and risk of the litigation having been thus cast upon the covenantor, the result, if adverse to and binding upon the covenantee as *res adjudicata*, is conclusive evidence, in an action by the covenantee against the covenantor *upon the covenant*, of its breach (Thomas v. Hubbell, 15 N. Y., 405).

I do not understand the rule to extend any further. It does not rest upon the ground that the covenantor becomes a party or privy to the original action, in the sense in which those terms are used when speaking of the conclusiveness of judgments as *res adjudicata*; for such is not the case, but it rests solely upon the force of the covenant.

Is the tax bill relied upon by the defendants a valid one? The tax sale was for the unpaid taxes for the years 1837 and 1840. The tax of 1837 returned unpaid was upon a piece of land forty-two feet front by seventy feet deep. The tax of 1840 returned unpaid was upon forty feet front by seventy feet deep, parcel of the land liable for the tax of 1837. The comptroller sold the forty-two feet by seventy feet for a single and entire sum, made up of the said taxes of 1837 and 1840, and interest and expenses. By the statute "whenever *any* tax on lands returned to the comptroller, and the interest thereon shall remain unpaid for," &c., the comptroller is to proceed to advertise and sell such lands at public auction. On the day mentioned in the notice he is to commence the sale of such lands, and continue the same from day to day until so much of *each parcel assessed* shall be sold, as will be sufficient to pay the taxes, interest and charges *thereon* (1 Rev. Stat., 409).

By the statute, as I read it, the comptroller is to put up for sale *each parcel* of the land assessed for the amount of the taxes, interest and charges upon it, and to strike off to the bidder who offers to take the smallest portion of the parcel and pay such amount, the portion so offered to be taken. By the course pursued in this case, the forty-two feet front by seventy feet deep not

chargeable with the tax of 1840 were sold for it. And the forty feet by seventy feet were sold for the tax which was chargeable upon it and other lands.

This, I think, was erroneous. By reference to the provisions in the same article of the statute, it will be seen that this is material as affecting the amount to be paid upon redemption. To redeem the whole of the lands sold, *the purchase money* and interest are to be paid.

To redeem any specific part of the lands sold, *such* proportion of the purchase money and interest is to be paid as the quantity sought to be redeemed bears to the whole quantity sold. In the case under consideration, the whole forty-two feet by seventy feet were sold. To redeem the two feet by seventy feet, there would have to be paid two forty-two parts of the tax of 1840, and the interest, &c., and which were not chargeable upon them.

I am also of the opinion that the tax title was never completed so as to make the comptroller's deed absolute.

The statute provides that if any land sold and conveyed by the comptroller be in *the actual occupancy of any person*, the grantee shall serve written notice on "*the person occupying* such land." The statute also speaks of the person entitled to notice as "the occupant."

The lands in question were and are covered with a building, in the principal story of which are stores; the residue is designed for a hotel. The building was chiefly occupied by Bennett as a hotel. One of the stores was occupied by Jennings & Churchill as a tailor and shoe shop. They were in it under a lease. They were tenants in the actual and open possession of it, and carrying on their business in it. Boarders, lodgers and servants in a hotel are not, in my opinion, occupants within the meaning of the statute, upon whom notice is to be served. But if a tenant in actual possession of a portion of the lands is not a "person occupying," an "occupant," who is?

The object of the statute is to bring home notice to those whose duty or interest it is to redeem the lands

from the tax sale. If the person whose interest or duty it is to redeem is not "an occupant," as it was in the case before us, the chances that the notice will get home to him when served upon all the "occupants," are greater than if served only upon some of them.

I am of the opinion that the defense based upon the tax title failed.

Is the Burwell title an outstanding one?

Burwell, at the time when the plaintiffs commenced the action to foreclose the mortgage of McKay to Oakley, and which had been assigned to them, was the owner in fee of the lands in question, and which were embraced in that mortgage.

He was not a party to that suit. At the time of the commencement of that suit he did not occupy the lands, and his deed was not recorded. There was no question of fraud raised on the trial.

It is probable that he was not made a party to that suit, from ignorance, on the part of the plaintiffs or their attorney, of his interest in the premises, and from neglect to make proper inquiry.

By the provisions of the statute then in force, in relation to the filing of notices of the pendency of actions, the notice filed did not affect Burwell's rights.

At that time it was only necessary by force of the recording act to have one's deed recorded, and the consequence of neglecting to have it recorded is declared in the act, and is that the deed shall be void as against a subsequent purchaser in good faith, and for a valuable consideration, whose deed shall be first recorded.

If the master's deed to the plaintiff had been recorded before the deed to Burwell was recorded, the case possibly might be within the recording act. But such was not the case, for Burwell's deed was recorded before the judgment even was rendered in the action.

The foreclosure was radically defective; because the owner of the fee was not a party to the action. The relative rights of the plaintiff and of Burwell were not changed by the judgment and sale. Burwell remained

the owner of the land in fee, and the plaintiff mortgagee (*Watson v. Spence*, 20 *Wend.*, 260; *Hall v. Nelson*, 23 *Barb.*, 99; *Sahlen v. Signer*, 37 *Id.*, 329; *Gage v. Brewster*, 31 *N. Y.*, 218).

Is Burwell's title lost by adverse possession and lapse of time? It is clear to my mind that section 52 of title 2, of chapter 4, of part 3, of the Revised Statutes,—requiring certain actions to be brought within ten years,—has no application to this case.

When the owner of the fee has been foreclosed by judicial proceedings, the remedy of an incumbrancer junior to the mortgage, who was not a party to the action or proceeding, and who has not been cut off, is possibly by action to redeem; which action must be brought within the time specified in the said 52nd section (*Calkins v. Calkins*, 3 *Barb.*, 305; *Cleveland v. Boerum*, 24 *N. Y.*, 613).

But the remedy of the owner of the fee is not confined to a bill in equity to redeem. He has a concurrent remedy at law; he may tender the amount due upon the mortgage, and bring ejectment at any time before twenty years' adverse possession has run against him (*Kortright v. Cady*, 21 *N. Y.*, 343).

To repeat what I have already in substance said, the plaintiffs are not and never have been the owners in fee of the lands in question: their only interest in them is that of mortgagee.

The fee of the premises at the commencement of this action was in Burwell, and at the time of trial in the defendant McKay, by grant from Burwell. The plaintiffs by force of their mortgage interest in the lands, cannot maintain ejectment against the defendant, who is in fact the owner in fee of them, unless the defendant is estopped from showing the true state of the title (2 *Rev. Stat.*, 312, § 57).

Upon the trial it was ruled that "the defendant was not in a position to set up the Burwell title, and that the proof of that title did not establish a defense to the action."

To which ruling the defendant excepted.

Formerly the doctrine of estoppel was carried in certain cases by the supreme court of this State to an erroneous extent.

Those cases were considered by the court of appeals in *Sparrow v. Kingman* (1 *N. Y.* [1 *Comst.*], 242), and overruled.

It is well settled that a grantee is not estopped from denying the title of his grantor, and that a grantor without warranty is not estopped from denying the title of his grantee (*Sparrow v. Kingman*, *supra*; *Averill v. Wilson*, 4 *Barb.*, 180; *Kenada v. Gardner*, 3 *Id.*, 589).

A conveyance without warranty is simply a release or quit-claim, and passes only the interest which the grantor or releasor had at the time.

In *Coke upon Littleton* it is laid down, "If there be father and son, and the father be disseized, and the son (living his father), releaseth by his deed to the disseizor all the right which he hath or may have in the same tenements without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseizor; for that he had no right in the land in his father's life, but the right descended to him, after the release made by the death of his father." "If there be warranty annexed to the release, then the son shall be barred. For albeit the *release* cannot bar the right for the cause aforesaid, yet the *warranty* may rebut and bar him and his heirs of a future right which was not in him at that time; and the reason (which in all cases is to be sought out) wherefor a warranty, *being a covenant* real, should bar a future right, is for avoiding of circuitry of action, which is not favored in law" (*Coke*, 265, b).

By the ancient common law of England a mortgage was a conveyance of the lands upon a condition subsequent; by it the estate and possession of the mortgagor vested, upon the delivery of the mortgage, in the mortgagee, subject to be defeated by a strict performance of the condition.

If the condition was not strictly performed, the grant was divested of the condition, and became absolute.

After forfeiture, the mortgagee held adversely to the mortgagor as if he had been an absolute grantee in the first instance. Upon the principles above stated, he was not estopped from denying the title of the mortgagor.

The elementary writers on the law of mortgages say that "accepting a mortgage does not estop the mortgagee from saying that the mortgagor had no estate in the mortgaged premises" (*Powell on Mortgages*, 232; *Coote*, 345).

This proposition is established in *Cameron v. Irwin* (5 *Hill*, 272, 280).

The English elementary writers also say, that "a mortgagor is never permitted to dispute all the title of his mortgagee, *because no man is permitted to dispute his own solemn deed*" (*Powell*, 221; *Coote*, 335. They cite *Goodtitle v. Bailey*, 2 *Cowp.*, 601). In *Goodtitle v. Bailey*, the instrument was a release with covenant for title.

That the reason assigned by these elementary writers does not support the broad proposition that "a mortgagor is never permitted to dispute the title of his mortgagee," has already been shown. If the mortgage deed contains a covenant for title, either express, or implied from the technical word importing a covenant, or any assertion or allegation respecting the title possessed by the mortgagor at the time of the making of the deed, he is estopped by them.

By the common law, at one period of his mortgage the mortgagor might have been estopped while in possession, upon the ground that he was a *quasi* tenant of the mortgagee. But under the law of this State he sustains no such relation to the mortgagee. The mortgagor is not divested by the mortgage of his title or estate in the mortgaged lands, but remains the owner of them.

The mortgage merely creates a lien upon the interest of the mortgagor in the lands, which may be enforced by legal proceedings, which may terminate in divesting him

of the estate mortgaged, and vesting it in some other person.

Until foreclosure, the mortgagee has at most a chose in action, and a lien or charge.

Before default in the payment of the money secured by the mortgage, the lien of the mortgage does not carry with it to the mortgagee the right to the possession of the mortgaged property. He cannot before foreclosure recover by action the possession of the premises from the mortgagor (2 *Rev. Stat.*, 312, § 57).

But if, after default, he can get peaceably into the possession of the mortgaged premises, he can with his mortgage defend his possession as against the mortgagor and those claiming under him.

The last proposition was questioned in *Fort v. Burch* (6 *Barb.*, 76). It is in seeming conflict with the spirit of the statute. But I consider it to be settled law.

Barber v. Harris (15 *Wend.*, 615) was ejectment by the purchaser at a foreclosure sale under a mortgage. The court ruled that the mortgagor was estopped from denying he had title to the lands, and from setting up title in third persons, and yet the plaintiff was not allowed to recover the whole premises embraced in the mortgage. The point does not appear to have been much considered. The case, I think, is in the class overruled by the cases above cited.

I am of the opinion that a mortgage without covenant or representation creates a lien only upon the interest which the mortgagor had in the lands at the time of the making of the mortgage, and that the mortgagor may show what that interest was ; and that a subsequently acquired title does not inure to the benefit of the mortgagee.

A father has the fee of certain lands in which his son has an estate for years ; the son, during the life of the father, mortgages the lands without warranty, and after the expiration of the term of years the father dies, leaving the son his sole heir ; is the estate which descended from

the father to the son bound by the mortgage? Is the son estopped?

If the son, after having made such mortgage, had conveyed the lands by deed with warranty, would the estate, subsequently descending from the father to the son, and which by force of the covenant would inure to the benefit of his grantee, be incumbered by the mortgage?

If, before the expiration of the estate for years, and before the death of the father the mortgage had been foreclosed by judgment and sale, would the estate, which upon the subsequent death of the father descended to the son, inure to the benefit of the purchaser? and would the son be estopped? I think not (2 *Rev. Stat.*, 191, § 158; *Packer v. Rochester & S. R. R. Co.*, 17 *N. Y.*, 283).

If the father died before the expiration of the term of years the mortgage probably would prevent a merger of the term of years. But it is said that even if it be true as a general proposition that one who is in possession of lands and mortgages them without warranty is not estopped to show the true state of the title, yet the mortgage in this case having been given to secure the purchase money takes the case out of the rule.

It is said that the mortgagor received the possession of the lands from the plaintiffs, under an obligation to surrender it back to the plaintiffs if default should be made in the payment of the purchase money. If this be so, then the defendant is estopped from denying the plaintiffs' title until he restores the possession to them.

Being now in possession, if he owed that allegiance to the plaintiffs he owes it still. His eviction by Steele, and his subsequent entry under Steele, did not destroy his allegiance to the plaintiffs, because the eviction was not by title paramount to the plaintiffs' title.

It is a general rule that when one person enters into the possession of lands under an executory contract for the purchase of them from another, he will not be permitted to set up a hostile title to retain the possession, until he has first surrendered it up to him from whom he

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received it. In such case the title of the land remains in the vendor, and the vendee takes the possession to hold it for the vendor. The vendor and vendee are in equity trustees for each other respectively. But in the case of an executed grant in fee the grantee holds the lands as his own, and adversely to the grantor, and the fact that he received the possession from the grantor with the deed does not change the character of his holding.

A mortgagor does not undertake to give up the possession of the mortgaged premises, upon default of the payment of the money, and is under no obligation to do so by the law of this State. If any such obligation existed the law would enforce it.

"A mortgagee has neither *jus in re* nor *jus ad rem*, but a mere security" (Gardner v. Heartt, 3 Den., 232; Packer v. Rochester & S. R. R. Co., *supra*).

That is, he has no right of property in the land, or right to its possession, but only a charge upon it.

It was said that the deed and mortgage must be read together as one instrument. For some purposes that is undoubtedly so.

But by reading them together their whole character and office cannot be changed. They cannot, thus, be construed to be an executory contract of purchase and sale, or to be a conditional sale, but their distinctive characters must be preserved.

It was also said that "the foreclosure of a mortgage for the purchase money cannot be resisted on the ground of defect or failure of the title." That depends upon whether such defect or failure constitutes an answer to the debt secured by the mortgage.

The proposition stated by the counsel is true, when the land was conveyed to the mortgagor without warranty, even if he has been evicted by paramount title. It is also true if the land was conveyed to him with warranty, and he has not been disturbed in his possession. Because in neither case does the defect or failure of title give a right of action against the grantor, nor discharge the mortgagor, or entitle him to relief in equity from the payment

of the debt secured by the mortgage. Besides, in an action to foreclose a mortgage the title of the lands cannot be tried. The object of the action is to change the lien into the ownership—*jus in re*—of that estate or right in the land bound by the mortgage.

If the mortgagor had no estate or interest in the land at the time of the making of the mortgage, and has not acquired any since, which by force of some covenant, &c. is brought in under the mortgage, the mortgagee or the purchaser under his judgment would acquire nothing.

If the title be in dispute, or if the land be held adversely, the foreclosure and sale puts the purchaser in position to try title. "It would be unjust as a general rule to involve the mortgagee in a dispute about the title in a proceeding which only gives him the right to try the title in another action (*Hersey v. Tarbett*, 27 *Pa.*, 418).

Savage entered under the deed from the plaintiffs. The mortgage by Savage to secure the purchase money contained no covenant, and did *not*, as has been shown, transfer the title or the right of possession of the land to the plaintiffs.

I think my brother erred in ruling that the defendant was not in a position to set up the Burwell title, and that that title did not constitute a defense.

Prior to 1830, the Burwell title would have constituted no defense to the action. It is not a title paramount to the mortgage of McKay to Oakley, but subject to the lien of that mortgage. It is what is commonly called an equity of redemption from that mortgage.

Before 1830, the mortgagee, after default in the payment of the money secured by the mortgage, and before foreclosure, could in an action of ejectment recover possession of the mortgaged premises, in order to render the mortgage available to the payment of his debts.

By the Revised Statutes of 1830, it is enacted that "no action of ejectment shall hereafter be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises" (2 *Rev. Stat.*, 312, § 57).

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The plaintiffs read in evidence the enrolled decree, &c., in the action to foreclose the mortgage of McKay to Oakley; and the object of the defendant in putting in evidence the Burwell title was to show that that foreclosure was a nullity, that the plaintiff was only a *mortgagee*, and consequently could not maintain this action.

I am of the opinion that the only interest the plaintiff has in the lands in question is that of mortgagee; that the defendant is not estopped from showing that fact, and that as mortgagee the plaintiffs cannot, under our statute, maintain an action of ejectment.

There must be a new trial.

CLINTON and VERPLANK, JJ., concurred.

*See also
61 Am. 271.*

EAST NEW YORK AND JAMAICA RAILROAD COMPANY *against* LIGHTHALL.

New York Superior Court; General Term, Nov., 1868.

POWER OF PRESIDENT OF COMPANY.—PAYMENT OF SUBSCRIPTIONS.—ACTS OF AGENT.

The president of a company by virtue of his office has power to collect subscriptions to the capital stock.

In the absence of any statutory restrictions, a corporation has power to receive payment otherwise than in money for subscription to the capital stock.

When payment of a subscription to capital stock has been made to one who is authorized to collect such subscriptions, the act of such agent, although beyond his authority, in allowing payment to be made otherwise than in money, cannot be rejected by the company after the contract is executed, so as to work to the injury of an innocent subscriber.

Appeal from a judgment and order.

The action was brought by the East New York and Jamaica Railroad Company against William A. Lighthall, to recover the amount of a subscription made by the defendant to the capital stock of the plaintiffs. The defense was payment.

It was proved that the subscription was made in July, 1866. The defendant testified that, about the 1st of November, one Degrauw, the president of the plaintiffs' company, came on board the cars at Jamaica, and asked the defendant if he would sell him coal stock. Defendant replied he would upon one condition. That he owed the plaintiff one thousand dollars, and had wanted to pay it for some time, and would sell the coal stock on that condition at the same price he paid for it—thirty dollars a share. Degrauw told defendant to come to his office. The next day defendant called at Degrauw's office, and transferred to Degrauw one hundred shares of the stock of the Mahony Coal Company, and received two acceptances of Degrauw of one thousand dollars each, and the following written agreement:

“NEW YORK, November 1, 1866.

“I hereby agree to deliver to William A. Lighthall, on the completion of the extension to Jamaica of the East New York and Jamaica Railroad Company, a certificate of stock of (20) twenty shares of the capital stock of said company.

“AARON A. DEGRAUW.”

A witness for the defendant testified that at the time the coal stock was transferred, the defendant said to Degrauw, “This pays my subscription for one thousand dollars;” and Degrauw said, “Yes, that is all right; when the stock is issued, I will give it to you.”

Degrauw contradicted all this evidence, and there was much other conflicting evidence as to whether Degrauw agreed to take the coal stock as payment of the subscription. Degrauw also testified that he, Mr. Black, and the secretary were authorized by the plaintiff to collect the stock subscriptions, but were never authorized to accept,

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in payment of the defendant's subscription, Mahony Coal Company Stock; and the plaintiffs' secretary and treasurer testified that the plaintiffs never authorized anything but cash to be taken for subscriptions to their capital stock.

The plaintiffs' counsel asked the court to direct the jury to find a verdict in its favor, on the grounds, among others, that the agreement did not show any permission to accept the coal stock for the subscriptions; and that Degrauw had no power to accept the coal stock in payment of the subscriptions.

The court refused the request, and the plaintiff excepted.

The court submitted the case to the jury, under instructions that if it was an agreement of Degrauw's to receive the coal stock as payment of the defendant's subscription to the capital stock of the plaintiffs' company, he had a right, as president of such company, to accept other things besides money in payment of the subscriptions to their stock. That if the jury found that Degrauw agreed to receive the coal stock as payment of the defendant's subscription, they must discharge the defendant. To these instructions the plaintiff excepted.

The jury found for the defendant.

A motion for a new trial was made upon the judge's minutes, and denied. Judgment upon the verdict was thereupon entered.

The plaintiff appealed from both judgment and order.

J. E. Parsons, for the plaintiffs, appellants.

W. W. Goodrich, for the defendant, respondent.

BY THE COURT.—MONELL, J.—The question which was submitted to the jury in this case was, whether Degrauw agreed with the defendant to receive the coal stock in payment for his subscription; and they were instructed that if they so found, the agreement was binding upon the plaintiffs.

If it was proper to submit such question to the jury, their verdict cannot be disturbed. The evidence was conflicting, and therefore not open for review upon these appeals.

But it is claimed that, notwithstanding Degrauw's agreement, the receipt of the coal stock by him was not payment to the plaintiff, for two reasons ; first, because the plaintiffs had no power to receive anything other than money in payment of subscriptions to its capital stock ; and second, because Degrauw had no authority to receive it, or to bind the plaintiffs by any agreement that it should be received in payment of the defendant's subscription.

Independently of the evidence furnished by the plaintiffs, that Mr. Degrauw was expressly authorized by them to collect stock subscriptions, I think he had power to do so, by virtue of his office, as president of the company.

Corporations can act only by and through their agents ; for although in law a person, and capable of exercising all the functions conferred upon it by law, it is yet, as a corporate aggregation, incapable of exercising such functions otherwise than through its officers and agents. Hence the acts of such officers and agents, performed within the scope of their official duties, are binding upon the corporation. Ordinarily, corporations do not differ from persons in the effect which is to be given to the acts of their agents. If the corporation has power, it may delegate such power ; and it is only when prohibited by law, or the act is not incidental to the purposes of its incorporation, that it is *ultra vires*, and void (*Sharp v. Mayor of N. Y.*, 40 *Barb.*, 256).

Receiving payment of subscriptions to its capital stock was no more out of the line of the president's duty, than receiving payment of any other debt, and it cannot be pretended that such receipt, had it been in money, would not have bound the plaintiffs, even although it never came to their possession. And the fact testified to by the secretary, that no one was authorized to receive any-

thing other than money, cannot impair the effect which must be given to the payment made by the defendant.

In this case, however, there was express authority given to the president of the company, and it therefore follows that his act is binding on the plaintiffs, unless the plaintiffs themselves were incapable of receiving anything other than money; and that is so, notwithstanding the authority given to the president may have been limited in terms to collections in money only (*Clark v. Metropolitan Bank*, 3 *Duer*, 241). It is a familiar principle, that the act of an agent, although in abuse or excess of authority, if within the general scope of the business he was employed to transact, is binding upon his principal as respects third persons, who, believing in the power of the agent, would sustain a loss if the act were not considered that of the principal (*Hope Mutual Life Insurance Co. v. Taylor*, 2 *Rob.*, 278).

It remains then to be seen whether the plaintiffs had power to receive payment otherwise than in money for subscriptions to their capital stock.

Every corporation has, besides the powers expressly conferred by its charter, certain common-law powers, which may be exercised in furtherance of the purposes of the corporation. Such common-law powers are the same as those possessed by individuals, and may be employed in the same manner, unless restricted by some positive or clearly implied prohibition of law (*Barry v. Merch. Exch. Co.*, 1 *Sandf. Ch.*, 580; *De Groff v. Am. Linen Thread Co.*, 21 *N. Y.*, 124). And the objection that an act of a corporation is *ultra vires* rests upon the absence of either express or implied power, and not upon the wrong use of it, especially where such wrong use may work injury to innocent persons.

These common law or implied powers in a corporation were fully recognized in *Curtiss v. Leavitt* (15 *N. Y.*, 9), where it was held that a corporation had power to contract a debt, and give its time obligation for its payment. And in a later case (*City Bank of Columbus v. Bruce*, 17 *N. Y.* 507) the receipt by a corporation of its own stock

in payment of a debt due to it, was sustained, as being within the incidental powers of the corporation. The court there say (SELDEN, J.) "I am not aware of any common law principle which forbids it, nor is it known to have been in contravention of any provisions of the charter of the company." And in *Magee v. Badger* (30 *Barb.*, 246), a railroad corporation took the promissory notes of a subscriber in payment of his subscription for stock, and it was upheld.

I have looked into the charter of the plaintiffs' company, and also at the provisions of the revised statutes to which the charter is subject, and do not find any limitations to the ordinary implied powers of all corporations, nor any provision which, either in express terms or by necessary implication, defines the thing which the plaintiff shall receive in payment for debts due to the corporation.

I do not think any question, whether receiving coal stock of another company was within the purposes of the plaintiffs' corporation, is involved in the present case. If this was an action upon an executory contract, to compel the plaintiff to receive the stock in payment for the defendant's subscription, it might be said, that dealing in such stock was foreign to the purposes of the company, and the contract therefore not within its implied powers. But in this case the contract was executed. The stock had been received by Degrauw in payment of the defendant's subscription, and, as has been seen, such receipt was the receipt of the plaintiffs, and cannot now be rejected upon any plea of want of authority.

And although the plaintiffs have not reaped the fruits of the transaction, they must, nevertheless, be concluded by the act of their agent, and not seek to inflict a wrong upon an innocent person, who, believing in the competency of the agent to act on behalf of his principal, had dealt with him accordingly.

I am of the opinion that the judgment and order appealed from should be affirmed.

GARVIN, J., concurred.



DIGEST
OF
ALL POINTS OF PRACTICE
EMBRACED IN
THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

Viz.—39 NEW YORK REPORTS; 51 BARBOUR; 5 ABBOTTS' PR. N. S.; 5 ROBERTSON; 1, 2, and 3 KEYES; and 1 EDMONDS' REPORTS OF SELECT CASES.

ABATEMENT.

1. In action upon a contract intended to be made between the plaintiff and the defendant, the fact that the defendant had a dormant partner, unknown to the plaintiff at the time of the contract, is not ground of abatement. *Ct. of Appeals*, 1866, *Cookingham v. Lasher*, 2 *Keyes*, 454.
2. An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff, for the tortious taking of assets, does not abate by the death of the plaintiff. The cause of action survives by virtue of 2 Rev. Stat., 447. *Ct. of Appeals*, 1867, *Emerson v. Bleakley*, *Ante*, 351.

ACCOUNTING.

1. One who purchases from a receiver, claims or demands, held and sold by the receiver, as such receiver, does not thereby acquire the right to sue thereon for an accounting, as if he were a trustee. *Ct. of Appeals*, 1865, *Mann v. Fairchild*, 2 *Keyes*, 106.
2. The rule that a trustee cannot purchase the trust property, is to be applied not only in case of valid trusts, but as well on settlements and accountings with trustees or assignees in cases when fraudulent assignments are adjudged void. For if such trustees hold under the assignment, they are

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trustees of an express trust to be executed according to the directions of the instrument; but if the assignment be avoided by creditors, the assignees are the trustees for the creditors under an equitable or constructive trust. *Ct. of Appeals*, 1867, *Colburn v. Morton*, *Ante*, 308.

3. The assigned property purchased in by the assignees still belongs to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase. *Ib.*

ACQUITTAL.

A plea of an acquittal, alleging that it was "on the ground of a variance between the indictment and the proof, the variance being that the proof failed to show" certain facts necessary to establish the offense alleged, is not sufficient, under the provisions of the Revised Statutes, as a bar to a trial and conviction upon a subsequent indictment for the same offense. *Ct. of Appeals*, 1867, *Canter v. People*, *Ante*, 21.

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1. An action can be maintained upon a promise made by the defendant, upon a valid consideration, to a third person, for the benefit of the plaintiff, although the latter was not privy to the consideration. And a creditor can maintain an action against a person who had received money from his debtor, upon a promise to pay the amount to the creditor. *Ct. of Appeals*, 1867, *Secor v. Lord*, 3 *Keyes*, 525.
2. Where a third person receives money due from a debtor to his creditor, and does not pay it over to the creditor, in consequence of which the creditor brings an action against the debtor and recovers his demand, the debtor may sue such third person to recover back the former payment. *Ct. of Appeals*, 1866, *Priest v. Price*, 3 *Keyes*, 222.
3. The acceptance of an order to pay money to be deducted from a payment to become due under a contract for work to be performed, is a promise to the payee, and the payee may recover thereon under the common money counts. [1 *Hill*, 84; *Id.*, 585; 2 *H. Bl.*, 241; 12 *Johns.*, 278; 17 *Wend.*, 206.] *Supreme Ct. Circuit*, 1846, *McClellan v. Anthony*, 1 *Edm.*, 284.
4. Where defendant subscribed in his own name for fifty shares of railroad stock, and at the same time subscribed for fifty more, signing his own name again, adding thereto the letters "Exr." to indicate that he took the additional fifty shares for an estate for which he was executor,—*Held*, that these were separate contracts, upon which separate actions would lie; and that the pendency of the action to enforce payment of the first subscription, formed no sufficient ground for abating the action to enforce the second subscription. *Ct. of Appeals*, 1865, *Erie & New York City R. R. Co. v. Patrick*, 2 *Keyes*, 256.
5. Malice and falsehood are essential ingredients in an action for malicious prosecution, but are not essential to an action for false imprisonment, in

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- which, however, the element of want of probable cause is necessary. *Supreme Ct. Circuit*, 1846, *Platt v. Niles*, 1 *Edm.*, 230.
6. In what cases an action lies against a village for neglect to maintain sidewalks. *Herrington v. Village of Corning*, 51 *Barb.*, 396.
 7. The fact that claim for a set-off might be interposed as a defense, is not necessarily an objection to bringing an equitable action to enforce the right of set-off, and obtaining an injunction against a cross action. *N. Y. Superior Ct.*, 1868, *Pardo v. Osgood*, 5 *Rob.*, 348; reversing *S. C.*, 2 *Abb. Pr. N. S.*, 365.
 8. *It seems*, that the exclusive right which a producer of a "literary composition" has to the same, after having communicated it by speech or by copy to other persons, is mainly to be protected by preventive remedies, and then only when such a reservation of it, either express or implied, accompanies each communication of it, as to make it more or less of a secret. *N. Y. Superior Ct.*, 1867, *Keene v. Clarke*, 5 *Rob.*, 38.
 9. An individual whose property is assessed without authority by a municipal corporation for a local improvement, may maintain an action to enjoin its collection, not only on the ground of avoiding a multiplicity of suits, but also to remove the cloud on the title [14 *N. Y.*, 434]; and the objection that all persons united in interest are not joined as plaintiffs, is waived if not set up by pleading. *Supreme Ct.*, 1868, *Ireland v. City of Rochester*, 51 *Barb.*, 414.
 10. Distinction between action for specific performance and an action to enforce a trust, considered in reference to the effect of delay. *Tomlinson v. Miller*, 3 *Keyes*, 517.
 11. A husband cannot maintain an action for the instantaneous killing of his wife through the negligence of defendant. The well-settled common law rule, that no damages can be recovered by action, for injuries resulting in immediate death, applies to actions brought by a husband for injury to his wife. The loss of society and assistance do not alter the case; and the New York statute of 1847 has not extended the remedy to such an injury. [Reviewing many authorities.] *Ct. of Appeals*, 1866, *Green v. Hudson River R. R. Co.*, 2 *Keyes*, 294; affirming 28 *Barb.*, 9.
 12. The rule that a single claim arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits, may be waived by an agreement by the debtor, that, if the creditor will forbear suing upon the whole demand, and will sue upon a part of it, then, in case he recovers, the defendant will pay the balance of the claim. And after the plaintiff has acted upon the faith of the waiver, the defendant cannot be allowed to invoke its protection, in order to defeat the plaintiff's just claim. *Ct. of Appeals*, 1866, *Mills v. Garrison*, 3 *Keyes*, 40.
 13. In an action to recover the possession of personal property, it is not necessary to show that defendant had possession in fact of the goods at the time the action was brought. If the defendant had been previously in possession, and was present at the time of a demand upon another per-

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son, and refusal by him at the place where the goods were, he cannot set up in defense of the action that he had parted with the possession to such person. [23 N. Y., 264; 9 Mees. & Wels., 19; 5 Carr. & P., 346.] The rule is, that any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain the action. [10 Wend., 349.] *Ct. of Appeals*, 1864, *Latimer v. Wheeler*, 1 *Keyes*, 468.

ADMEASUREMENT OF DOWER.

A proceeding to admeasure dower, which is a mere supplement to an action of ejectment in which plaintiff has established her right to dower, is governed by 2 Revised Statutes, 303, 312, §§ 48, 50, and not by 2 Revised Statutes, 448; and the appointment of commissioners may be without notice to any but the parties to the action. The notice may be given to the attorney in the action. *Ct. of Appeals*, 1863, *Stewart v. Smith*, 1 *Keyes*, 59.

ADVANCEMENT.

1. A verbal agreement between father and son, that the son should have a certain piece of land in full for his share as heir of the estate of the father, (the land being, at the time of the agreement, of proportionate value to constitute such share), without any writings being made between them, and no written evidence of title given by the father to the son, is, if followed by possession and enjoyment by the son, an advancement, within the provisions of the Revised Statutes applicable to advancements to children by their parents (1 Rev. Stat., 754); and if it does not appear that the decedent left any personal or real estate other than what he possessed at that time, so that the advancement appears to be equal, if not superior to the amount of the share which the child would have been entitled to have received from the estate as heir, such child and his heirs will be excluded from any further share in the estate of the decedent. *Ct. of Appeals*, 1866, *Parker v. McCluer*, *Ante*, 97. Compare *Chase v. Ewing*, 51 *Barb.*, 597.
2. Equity would interpose against the claim of the heir in such case. *Ib.*
3. The provisions of the statute relative to advancements applies to transactions in the nature of advancements made before the enactment of the statute. *Ib.*

AFFIDAVIT.

It is not ground for vacating an attachment that the affidavit on which it was obtained was sworn to before a commissioner in another State, but that no certificate of the secretary of state was obtained, as required by the act of 1850, ch. 270, § 4. The omission may be supplied. *Supreme Ct.*, 1868, *Lawton v. Kiel*, 51 *Barb.*, 30.

ARREST; ATTACHMENT; FORECLOSURE.

AFFIRMATIVE RELIEF.

In an action of a legal nature to recover the possession of land from a purchaser who has made default in his contract, where the defendant sets up by his answer a sufficient ground for equitable relief from the forfeiture, such relief may be granted although the answer does not claim affirmative relief, if no objection be taken to this defect until after trial and appeal. *Supreme Ct.*, 1868, *Cythe v. La Fontain*, 51 *Barb.*, 186.

ALIENS.

1. An alien may take land by grant, and hold it at the will of the State. *Buffalo Superior Ct.*, 1866, *Larreau v. Davignon*, *Ante*, 367. Compare *People v. Snyder*, 51 *Barb.*, 589.
2. The State cannot enter upon his possession until the alienism and escheat have been judicially established. *Ib.*
3. By the common law, lands held by an alien on his death vest in the State. Otherwise, when a citizen holding lands liable to escheat dies. *Ib.*

DESCENT.

ALIMONY.

1. In an action by a man to obtain a decree declaring void a marriage for the reason that the defendant at the time of such marriage had a living husband, the fact being admitted, the court will not grant the defendant alimony and a counsel fee; because she is admittedly not the wife of plaintiff. *Supreme Ct.*, 1868, *Appleton v. Warner*, 51 *Barb.*, 270.
2. Where the defendant in an action for divorce is imprisoned for the non-payment of alimony, he can be relieved from imprisonment only under the provisions of the Revised Statutes relating to proceedings for contempts in civil actions, &c. (2 Rev. Stat., 538, § 20). The defendant on a motion for a discharge from imprisonment, and for a reduction of the amount of alimony, may be discharged on paying the amount due for alimony for which he was committed, and the amount accrued during his imprisonment. And the order for alimony may at the same time be reduced. *N. Y. Superior Ct. Sp. T.*, 1866, *Graley v. Graley*, 5 *Rob.*, 641.

AMENDMENT.

1. The power of the court to allow amendments to pleadings has not been enlarged by the Code of Procedure. The courts never claimed, either at common law or under any statute previous to the Code, the power to allow an amendment to an existing pleading, by the insertion of a new and different cause of action or defense; nor is such power extended by section 173 of the Code of Procedure,—which allows an amendment of

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- pleadings "by inserting other allegations material to the case." *N. Y. Superior Ct.*, 1866, *Woodruff v. Dickie*, 5 *Rob.*, 619.
2. Under the Constitution of 1846, the judge presiding at the trial has full power of amendment of pleadings, although previously the law required that application be made to the court. *Supreme Ct. Circuit*, 1847, *Jacobs v. Hooker*, 1 *Edm.*, 472.
 3. As regards the allowance of amendments of pleadings, a judge presiding at the trial of a cause, even with a jury, possesses all the powers of the court on motion at special term, and can allow them in the same manner, and with like effect, as the court sitting in any other organized form for the administration of justice. *N. Y. Superior Ct.*, 1866, *Woodruff v. Dickie*, 5 *Rob.*, 619.
 4. In an action on a promissory note, it appeared upon the trial that the consideration of the note was goods sold and delivered, and the authority of the signer of the note, to make it and bind the defendants was questioned.—*Held*, that it was competent for the court to allow an amendment of the complaint by inserting a count for goods sold and delivered, without terms, and allowing the trial to proceed immediately. Such is not a case of changing substantially the claim. [23 *N. Y.*, 357; 20 *Id.*, 81; *Id.*, 355; 18 *Id.*, 515; 22 *Barb.*, 161; 44 *Id.*, 528; 11 *How. Pr.*, 168; 6 *N. Y.* (2 *Seld.*), 19; 22 *How. Pr.*, 481.] *Supreme Ct.*, 1868, *Vibbard v. Roderick*, 51 *Barb.*, 616.
 5. The court being bound to take judicial notice of the fact that the Eighth Avenue, in the city of New York, is a public highway, where a complaint avers that a personal injury to the plaintiff was done there, caused by the willful and improper conduct of the defendants' servant, an amendment stating that the injury occurred in a "public" highway is wholly unnecessary. *N. Y. Superior Ct.*, 1867, *Whittaker v. Eighth Avenue R. R. Co.*, 5 *Rob.*, 650.
 6. *It seems*, however, that the allowance or rejection of such an amendment, on the trial, is entirely discretionary. *Ib.*
 7. An amendment of the judgment, in an action for the recovery of personal property and damages for its detention, by allowing the defendant the alternative of returning the property claimed, is a material alteration, and the defendant is entitled to notice of the change having actually been made, or the entry of the new judgment. A mere notice of permission to amend having been given is not sufficient to start the running of the time for bringing an appeal. *N. Y. Superior Ct.*, 1867, *Brown v. Hardie*, 5 *Rob.*, 678.
 8. In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail.—*Held*, that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict. *Ct. of Appeals*, 1867, *Emerson v. Bleakley*, *Ante*, 350.

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9. Excepting to bail, taken by the sheriff, is an "act to be done," within the meaning of section 174 of the Code, permitting the court, in its discretion, "to allow an answer or reply to be made, or any *other act* to be done," after the time limited by the Code for doing it. If the sheriff has been prejudiced by the neglect to except, that is a matter to be shown in opposition to the motion, to influence the discretion of the court. *N. Y. Superior Ct. Sp. T.*, 1866, *Zimm v. Ritterman*, 5 *Rob.*, 618.
10. *It seems*, that when leave to except to bail taken by the sheriff is given, after the time for excepting has expired, it will be on terms, and reserving any right of the sheriff to set up the neglect to except in time in any action against him. *Ib.*
11. An affidavit upon which an attachment was granted being defective, by reason of omission to annex the certificate of the secretary of state, the plaintiff was allowed to take the original from the files, and return it duly certified. *Supreme Ct.*, 1868, *Lawton v. Kiel*, 51 *Barb.*, 30.
12. Under an order appointing *Joseph G.* as one of several commissioners, *James G.* took the oath of office, and acted as such.—*Held*, that it being clear that he was the person intended to be appointed, and there being no evidence that there was such a person as *James G.*, and the substitution of names being shown to be a clerical error, the mistake was amendable. *Ct. of Appeals*, 1864, *Ganson v. City of Buffalo*, 1 *Keyes*, 454.
13. If the statement of a party upon the trial that he is misled by a variance, be apparently assumed to be true, and the amendment is accordingly granted upon terms by the court, and the other party make no objection, they cannot, on appeal, object to the absence of the proof of being misled, or to the terms on which the amendment was allowed. A party may insist on proof that his adversary was misled by variance, or he may waive the proof, and accept a statement of the fact in lieu. *Ct. of Appeals*, 1866, *Griggs v. Howe*, 3 *Keyes*, 166; *S. C.*, 2 *Id.*, 574; affirming 31 *Barb.*, 100.
14. Where a defendant lies by until trial before objecting to the sufficiency of the complaint, it is a proper exercise of discretion in the court or referee to allow the necessary allegations to be supplied by amendment, if they do not amount to a new cause of action. [18 *N. Y.*, 515.] *Ct. of Appeals*, 1866, *Woolsey v. Trustees of Rondout*, 2 *Keyes*, 603.

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1. Where the makers and several indorsers of a note are sued in one action, an answer by the makers will not inure as an answer by the indorsers, nor will the answer of one of several indorsers inure as an answer of the others. *Supreme Ct. Circuit*, (1847?) *Alfred v. Watkins*, 1 *Edm.*, 369.
2. It is essential to an answer setting up a tender, to aver that the money has been actually brought into court. *N. Y. Superior Ct. Sp. T.*, 1867, *Hill v. Place Ante*, 18.
3. In an action on a foreign judgment, matters of defense alleging fraud in

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the obtaining of that judgment, even if conceded to be frivolous, cannot be held *irrelevant*, so as to be stricken out under section 152 of the Code. *Supreme Ct.*, 1869, *Fasnacht v. Stehn*, *Ante*, 338.

4. Where a plaintiff avers a mistake on his part in taking a conveyance of property which he insists is wrongly described in the instrument of conveyance, and asks to have the defendant adjudged to correct the mistake *in the conveyance*, and the defendant, in his answer, says that *he* made a mistake in the *contract of sale*, and that the property he intended to sell was the one described in the conveyance, and asks leave to have the *contract* reformed;—his omission to allege that there was a mistake also on the part of the plaintiff, in the *contract*, renders the matter set up in the answer irrelevant, and the answer constitutes no defense. *Supreme Ct. Sp. T.*, 1868, *Kreitz v. Frost*, *Ante*, 277.
5. *It seems* that, in an answer in an action of libel or slander, it is not competent to plead both a justification and matter in mitigation; for the one insists upon the truth of the charge, the other admits that it was unfounded. *Supreme Ct.*, 1868, *Gorton v. Keeler*, 51 *Barb.*, 475.
6. The defendant in an action has the right to serve an amended answer within twenty days after service of the original, and to include therein a new defense; and this without regard to the nature of the defense. *Ct. of Appeals*, 1867, *McQueen v. Babcock*, 3 *Keyes*, 428.
7. *It seems*, that evidence showing the acquiescence of the plaintiff in the defendant's acts, is admissible under an answer denying the allegation that the acts were done without consent of the plaintiff, and by force, &c.; but if not, the objection must be taken at the trial, and is not available on appeal. *Ct. of Appeals*, 1866, *Rowan v. Kelsey*, 2 *Keyes*, 544.

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1. Under the Code of Procedure, as well as by the old practice, in no case of judgment by default can there be an appeal to an appellate tribunal; but the aggrieved party must seek relief, if he is entitled to any, by motion to the court in which the action is pending. When the law allows a defendant the privilege of being summoned, it imposes on him a corresponding duty, which is, that, if he has any ground of defense, he shall appear and prove it in the primary court having cognizance of the matter. To allow him to pass by the inferior tribunal unnoticed, would be to convert the appellate court into one of original jurisdiction. A judgment by default is, for this purpose, equivalent to a judgment by confession. [23 N. Y., 162; 5 How. Pr., 323; 7 N. Y. Leg. Obs., 91; 10 How., 120; 13 N. Y. (3 Kern.), 343; 16 N. Y., 610; 22 Id., 517; 20 Johns., 282.] This rule applies to an appeal to the supreme court from a judgment by default in a county court, especially where the objection is a defect in the pleading. *Ct. of Appeals*, 1864, *Maltby v. Green*, 1 *Keyes*, 548.

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2. An order dismissing an appeal from the special term to the general term, merely for neglect to comply with an order respecting the security to be given for the purpose of insuring a stay of proceedings, is not a matter of discretion, but of strict legal right; and as the effect is to prevent a judgment from which an appeal to the court of appeals might be taken, it is an appealable order. [Code, § 11; 20 N. Y., 525.] *Ct. of Appeals*, 1864, *Genter v. Field*, 1 *Keyes*, 483.
3. A refusal to grant a temporary injunction against the collection of a tax, where but a small portion of the amount involved in the controversy can be affected at the time by such temporary injunction, is not an order which in effect determines the action, and prevents a judgment from which an appeal might be taken; and therefore an appeal does not lie from it to the court of appeals. *Ct. of Appeals*, 1867, *Hasbrook v. Kingston Board of Education*, *Ante*, 399.
4. In order to sustain an appeal, the papers should show that the motion was denied upon the ground that the plaintiffs could ultimately have no relief. *Ib.*
5. An order removing the committee of a lunatic, and appointing another person in his stead, is a matter in the discretion of the court, and an appeal does not lie therefrom to the general term. *Supreme Ct.*, 1868, *Matter of Griffin*, *Ante*, 96.
6. From an order to show cause, granted *ex-parte*, returnable at a future day, and allowing a temporary injunction pending the motion, no appeal will lie to the general term until a hearing has been had on the original order to show cause, or on a motion to vacate or modify such order. *Supreme Ct.*, 1868, *Bloodgood v. Erie Railway Co.*, 51 *Barb.*, 273.
7. The holding or decision of a judge upon a point wholly immaterial to the issue determined, being but an expression of opinion, presents no ground for appeal. *Ct. of Appeals*, 1866, *Van Rensselaer v. Bouton*, 3 *Keyes*, 260.
8. It is the duty of the party who designs to appeal to the court of appeals, to procure such a finding of the facts as to show affirmatively the error upon which he relies. If it cannot be made out from the findings whether the judgment is right or wrong, it will be assumed to be correct, and will accordingly be affirmed; in other words, the judgment must appear to be erroneous by applying the conclusions of law, or the general judgment pronounced, to the conclusion of facts stated in the findings, or the appellant cannot ask for a reversal. [22 N. Y., 323.] *Ct. of Appeals*, 1863, *Rice v. Isham*, 1 *Keyes*, 44.
9. An appellant, by not preparing and serving a case, is only cut off from using on appeal anything but the record containing the pleadings, verdict and judgment. *N. Y. Superior Ct.*, 1867, *Brown v. Hardie*, 5 *Rob.*, 678.
10. An appeal to the general term is not to be dismissed because the appellant fails to comply with an order requiring him to give a new undertaking on account of the insolvency of the sureties, where the undertaking was that given to insure a stay of proceedings merely. Such under-

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- taking is no part of the appeal, but only relates to the stay. *Ct. of Appeals*, 1864, *Genter v. Fields*, 1 *Keyes*, 483.
11. In an action on an indorsement made by an agent, a general finding of fact that the agent was the agent of the company, will not be construed, by the appellate court, as a finding that he was merely an agent to indorse, but may be regarded as importing authority also to receive notice of dishonor. *Ct. of Appeals*, 1867, *Bank of Auburn v. Putnam*, 3 *Keyes*, 343.
 12. The objection that a juror was improperly rejected, cannot obtain for the first time on appeal. *Supreme Ct.*, 1868, *Voorhees v. Dorr*, 51 *Barb.*, 580.
 13. In an action on a contract, the question whether the contract was not entire so as to require performance by plaintiff before recovery not having been raised upon the trial,—*Held*, that such question could not be raised by the appellant on appeal. *Ct. of Appeals*, 1867, *Jenkins v. Wheeler*, 3 *Keyes*, 645; affirming 4 *Rob.*, 575.
 14. In a creditor's action, judgment was rendered setting aside an assignment as void, and directing the assignees to account. A referee was appointed to take the accounting, and on his report coming in, an order was entered upon his report, requiring defendants to pay to the receiver the sum certified against them on the accounting. No appeal was taken from the first judgment or order, but the defendant appealed from the second one, made upon the accounting, and the supreme court at general term, on considering the appeal, reversed both orders.—*Held*, that on an appeal to the court of appeals the latter court might review the question on the merits, whether the defendants were accountable for certain items found against them by the referee, although this was done in pursuance of the order or judgment made on the trial of the issues, which had not been appealed from. *Ct. of Appeals*, 1867, *Colburn v. Morton*, *Ante*, 308.
 15. In an action of an equitable nature,—*e. g.*, by one member of a partnership to enforce against the other members, or the estate of a deceased member, claims growing out of the partnership business,—a referee's finding of the facts is held conclusive, if there is any evidence to sustain it: The appellate court will not inquire into the weight of the evidence. *Ct. of Appeals*, 1867, *Barker v. White*, *Ante*, 124.
 16. On a trial before a jury, where the court directs a verdict for the defendant, if there is any question for the jury, the party should request the court to submit the same; if no such request is made, the question cannot be considered on review. *Ct. of Appeals*, 1864, *Seymour v. Cowing*, 1 *Keyes*, 532.
 17. A judgment of reversal of the report of a referee will not be deemed to have been granted on questions of *fact*, unless so stated in the judgment of reversal. *Ct. of Appeals*, 1865, *Thompson v. Menck*, 2 *Keyes*, 82.
 18. If the proof of foreign statutes, necessary to sustain the case of a party, is not made in the court below, the omission cannot be supplied on the

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- argument of an appeal, in the court of appeals, by reading the foreign statutes there. *Ct. of Appeals*, 1866, *Monroe v. Guillaume*, 3 *Keyes*, 30.
19. In an action of a legal nature to recover the possession of land from a purchaser who has made default in the payment of an installment, if the defendant interposes a defense of an equitable nature,—such as some ground upon which he ought to be relieved in equity from its strict performance,—the court may consider the cause as an equitable action, so far as to allow it to be reviewed on appeal as such, although it could not be so reviewed if it were strictly a legal action. *Supreme Ct.*, 1868, *Cythe v. La Fontain*, 51 *Barb.*, 186.
20. Where the facts, to which excepted testimony relates, are found, wholly independent of such testimony, and conclusively determine the rights of the parties, it is immaterial whether such testimony was competent or not. *Ct. of Appeals*, 1867, *Secor v. Lord*, 3 *Keyes*, 525.
21. Upon an appeal from an order of special term, striking out a demurrer as frivolous, the court at general term have power to modify the order, by giving defendants leave to answer, and may leave the costs to abide the event. *Ct. of Appeals*, 1866, *Poppenhusen v. Seeley*, 3 *Keyes*, 150.
22. The rule laid down in *Grant v. Morse* (22 N. Y., 323),—that the general conclusion of the referee is to be construed as involving a finding upon all the material questions, though such a finding be not expressed in terms,—applied in a peculiar case. *Bently v. Smith*, 2 *Keyes*, 342.
93. The fact that the court differed with the jury upon a question of evidence, is not a sufficient ground for reversing judgment. *Ct. of Appeals*, 1865, *McClune v. Cain*, 2 *Keyes*, 203.
24. The court of appeals will not reverse a judgment entered on the report of a referee, on the ground that the evidence establishes a fact which the referee has not found. *Ct. of Appeals*, 1864, *Herrick v. Ames*, 1 *Keyes*, 190.
25. In nicely balanced cases, turning on the negligence of defendants, a court of review should not, generally, interfere with the verdict. *Ct. of Appeals*, 1864, *Dickens v. New York Central R. R. Co.*, 1 *Keyes*, 23.
26. An order of the supreme court, setting aside a judgment on the ground that it was obtained by collusion or was founded in fraud,—*Held*, to have been within the discretion of the court, and accordingly affirmed. *Ct. of Appeals*, 1866, *Baldwin v. Mayor, &c. of New York*, 2 *Keyes*, 387.
27. In an action of a legal nature to recover back the possession of land from a purchaser, on the ground that he had made default in payment,—*Held*, that upon reversing a judgment for the plaintiff on the ground that upon the undisputed facts the defendant was entitled to equitable relief against the forfeiture, the court could not direct final judgment for the defendant, but a new trial must be ordered. *Supreme Ct.*, 1868, *Cythe v. La Fontain*, 51 *Barb.*, 186.

ARREST.

ARBITRATION.

1. A submission to appraisers of the amount of damages by fire, under a condition contained in a policy of insurance, and their appraisement, are not an arbitration and award, within the rule that partners cannot bind each other by arbitration, as no action can be maintained on that alone. The action must be brought on the policy of insurance, and such appraisement is only the determination of an incidental fact. *N. Y. Superior Ct.*, 1867, *Brink v. New Amsterdam Fire Insurance Co.*, 5 *Rob.*, 104.
2. Under a lease in which the lessor covenants to give a renewal if the lessee should serve a notice binding himself to take and accept it, the rate of rent upon such renewal to be fixed by arbitration,—the giving of such notice becomes immaterial after the parties have both proceeded to the appointment of arbitrators. *Supreme Ct. Sp. T.*, 1868, *Viany v. Ferran*, *Ante*, 110.
3. In such case, if the arbitration fails, by reason of the arbitrator chosen being unable to complete the reference, and the parties failing to agree on another umpire, the lessee may maintain an action of an equitable nature to compel the execution of a renewal lease, and have a reference to ascertain what the amount of rent should be. *Id.*

ARREST.

1. An agent who is intrusted with negotiable paper to be discounted, and who transfers it to a *bona fide* purchaser, and receives the proceeds, applying them to his own use, is liable for the money in a fiduciary capacity. *N. Y. Superior Ct.*, 1866, *Wolf v. Brouwer*, 5 *Rob.*, 601.
2. Although an order of arrest ought not to be granted upon general assertions made on information only, yet if such allegations are not met by a denial on a motion to discharge from arrest, they will be taken to be true. *N. Y. Superior Ct. Sp. T.*, 1866, *Wolfe v. Brouwer*, 5 *Rob.*, 601.
3. Where the right to an arrest flows directly from the nature of the cause of action itself,—*e. g.*, in an action for the wrongful conversion of personal property,—the court will not try the merits upon affidavits, and will not discharge the order, unless the defendant makes out a clear case of innocence. *N. Y. Com. Pl. Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, *Ante*, 54.
4. It is no reason for dispensing with this rule, that the calendar is so crowded that the case may not be reached for a trial on the merits for a long time; and that, meanwhile, the defendant, being unable to procure bail, is imprisoned. In such a case, the court of common pleas will advance the cause upon the calendar, so as to give an early trial. *Id.*
5. Where the defendants fail, upon a motion to vacate an order of arrest, to overthrow the charges contained in the affidavit upon which such order was obtained, that certain moneys received by them in a fiduciary capac-

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- ity, were still retained by them, the motion to vacate the order of arrest should be denied. *N. Y. Superior Ct.*, 1867, *Swift v. Wylie*, 5 *Rob.*, 680.
6. *It seems*, that the capacity in which a defendant procures money of the plaintiffs, so as to subject him to arrest for withholding it, is part of the cause of action, and must be proved on the trial; and neither a referee nor the court has a right to try that question on affidavits. Hence a referee has no right to discharge a defendant, merely because he has arrived at the conclusion, from all the evidence offered, on a motion for such discharge, that the money due from the defendant was not received in a fiduciary capacity. *Ib.*
7. Whether an oral agreement that a vendee shall *retain possession* of choses in action in his hands for sale as an agent, as part of an oral contract by the owner, to sell them to him, is or is not good as a *delivery* of them, so as to take such sale out of the operation of the statute of frauds, *it seems*, that it will at least operate to revoke any power of selling given previously, to such vendee, as an agent, and thus destroy all previous fiduciary relation between him and the vendor. *Ib.*
8. Under the act to abolish imprisonment for debt (act of 1831), one who has given the bond required by subdivision 4 of section 10, conditioned that he shall apply within thirty days for a discharge, may apply after the lapse of thirty days. The jurisdiction of the officer to entertain the application is not limited by the condition of the bond. *Supreme Ct. Chambers*, 1846, *Matter of Bradlie*, 1 *Edm.*, 262.
9. Under the treaty between the United States and Chili,—which provides that the consuls of the contracting parties may have deserters from vessels arrested by “the authorities of the country,” by applying to the courts, judges and officers competent,—the application must be made to the authorities of the United States. A magistrate of one of the States has not jurisdiction. *Supreme Ct. Chambers*, 1846, *Matter of Leon*, 1 *Edm.*, 311.

ASSESSMENTS.

1. The act of 1858, ch. 338,—which authorizes the court to set aside certain municipal assessments for fraud or irregularity,—does not authorize such proceedings to be taken upon the ground that the work has not been well done, or that the contract has not been fully performed, that the materials used were not according to specifications, or the surveys and certificates required by the ordinances were not made; nor on the ground that the common council have in effect contracted with the owner not to make such an assessment. Such matters are not within the purview of the statute, except where fraud is alleged. *Supreme Ct.*, 1868, *Matter of Lewis*, 51 *Barb.*, 82.
2. An assessment in the city of New York will be set aside if the commissioners have included a charge for making it. *Ib.*

ASSIGNMENT.

ASSIGNABILITY OF CAUSE OF ACTION.

A cause of action for damages for procuring a sale of goods by false representations, is assignable; and the assignees may sue thereon without joining the assignor. *N. Y. Superior Ct. Sp. T.*, 1868, *Johnston v. Bennett*, *Ante*, 331; *Supreme Ct.*, 1865, *Allen v. Brown*, 51 *Barb.*, 86.

ASSIGNMENT.

1. How far equity will support assignments of contingent interests and expectations. *Stover v. Eycleshimer*, 3 *Keyes*, 620; affirming S. C., 46 *Barb.*, 84.
2. Necessity of delivery under assignment to creditors for their own benefit. *Van Buskirk v. Warren*, 2 *Keyes*, 119.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Either member of a partnership may secure one of its creditors by a transfer of property; and this may be done by an assignment in the nature of a mortgage, with a trust to account for and repay the surplus, if any. *Ct. of Appeals*, 1867, *McClelland v. Remsen*, *Ante*, 250.
2. The statute of 1860 (*Laws of 1860*, 594, ch. 348, § 1,—providing that every assignment of an estate by a debtor, in trust for creditors, shall be in writing, shall be duly acknowledged, and the certificate of acknowledgment indorsed upon such assignment, before delivery thereof to the assignees,—is not merely an affirmative declarative statute. It introduces a new law in regard to assignments, and is peremptory, requiring every such assignment to be duly acknowledged and indorsed before delivery. The very language of the statute implies the negative of the right to make an assignment in any other way,—asserting by implication that *no assignment shall be delivered* without acknowledgment, &c. *Ct. of Appeals*, 1868, *Hardman v. Bowen*, *Ante*, 332. See FRAUDULENT CONVEYANCES, 2.
3. A neglect to record an assignment within the statutory period fixed therefor, does not make it fraudulent. *N. Y. Superior Ct. Sp. T.*, 1866, *Denzer v. Mundy*, 5 *Rob.*, 636.
4. If a debtor, making an assignment for benefit of creditors, prefers his landlord for rent of his dwelling, the assignment is void, if this be done with intent to secure the occupation of the dwelling-house for the benefit of himself and family, subsequent to the assignment, without paying rent or being liable therefor. *Ct. of Appeals*, 1867, *Elias v. Farly*, *Ante*, 39.
5. Assignees of real property for the benefit of creditors are entitled to full indemnity against their expenditures. Even though the assignment is set aside as void, and their claim to have purchased the property for their own benefit is also declared void, they should be protected on the accounting in so far as they acted intentionally for the benefit of the trust, in

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- good faith, and without negligence. *Ct. of Appeals*, 1867, *Colburn v. Morton*, *Ante*, 308.
6. Payments for taking charge of and preserving the trust property, such as for harvesting and saving grain crops, and for the discharge of liens, are within this rule. *Ib.*
 7. If, upon the accounting, they insist on the claim that they purchased the property in their own right, they may be charged with the difference between the amount paid by them on the purchase of the property, and its actual value. *Ib.*

ASYLUMS.

1. Regulations of an asylum for aged seamen, which forbid inmates to leave the premises without permission from the governor or an assistant, and enjoin quiet demeanor at the table, on pain of expulsion, are reasonable regulations, and an expulsion for a breach of them is lawful. *Supreme Ct. Sp. T.*, 1868, *People ex rel. Newman v. Sailors' Snug Harbor*, *Ante*, 119.
2. In the absence of any provision of the charter or by-laws on the point, the court will not deem the governor of an asylum vested with the power to expel an inmate without the authority of the trustees, or at least of the executive committee. *Ib.*
3. The accused inmate should have notice of the examination of the charges against him, and an opportunity of being heard. *Ib.*

ATTACHMENT.

1. An action for the recovery of damages arising on the breach of a contract to purchase sound corn, the breach being that the corn was not sound, and the damages claimed being the difference between the cost price and the price at which the plaintiff sold the same, is an action arising on contract. The sum of damages being ascertained by the sale, an attachment may issue in such an action, under the Code of Procedure. [18 Barb., 139.] *Supreme Ct.*, 1868, *Lawton v. Kiel*, 51 Barb., 30.
2. Where, on an application for an attachment on a charge of "removing and disposing of property, and departing from the State, with intent to defraud the plaintiffs," the only proof was by a single witness, of an offer by the defendant to sell him her stock in trade for less than to any other person, and a request by him to keep the matter secret;—*Held*, this was not sufficient to sustain the attachment, particularly where the defendant was carrying on business in a store, with a stock of goods valued at \$2,000, while no indebtedness beyond \$400 was proved. *N. Y. Superior Ct. Sp. T.*, 1866, *Frank v. Leire*, 5 Rob., 599.
3. An attachment cannot be sustained against the property of a debtor, upon an allegation of the removal of the property of such debtor from his store, by a third person claiming to be his assignee, merely because there is no assignment filed in the clerk's office, although a general charge of a

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- fraudulent assignment by the debtor, to cheat and defraud his creditors, is sworn to. The mere allegation of a belief of the plaintiff of the fraudulent intent of the defendant in removing such goods, which removal he is superintending, or of a fraudulent assignment in general terms, does not furnish grounds for judicial action. *N. Y. Superior Ct. Sp. T.*, 1866, *Denzer v. Mundy*, 5 *Rob.*, 636.
4. Facts on which an attachment granted on allegation of removing with intent to defraud plaintiff, was set aside. *N. Y. Superior Ct.*, 1866, *Frank v. Levie*, 5 *Rob.*, 599.
 5. Mere indebtedness of an owner of a stock of goods does not impose such a disability upon him as to warrant the inference of fraud if he sells them. Additional circumstances, such as hurried sale, low price, concealment, &c., are necessary to establish a fraudulent purpose. *Ib.*
 6. *It seems*, that an attachment cannot be sustained if the given name of the defendant is not stated in the papers. *Ib.*
 7. An affidavit to obtain the issue of an attachment under the Code of Procedure need not allege that the defendants have property within the State, nor that summons has been issued. The issue of summons is evidenced by its delivery, together with the attachment, to the sheriff. *Supreme Ct.*, 1868, *Lawton v. Kiel*, 51 *Barb.*, 30.
 8. An attachment issued as a provisional remedy, under the Code of Procedure, cannot be dissolved as to a part of the property merely, upon giving security as to such part, under sections 240 and 241 of the Code. An application for a discharge, upon the undertakings specified in those sections, must relate to the whole of the property levied on. *N. Y. Com. Pleas Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, *Ante*, 54.
 9. A warrant of attachment issued in a pending action should not be set aside because the warrant, after stating the existence of the cause of action, does not state that the action is pending. If the facts are sufficient, the warrant is not void for omitting to state one of them. *Supreme Ct.*, 1868, *Lawton v. Kiel*, 51 *Barb.*, 30.

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1. The right of a party to change his attorneys is an absolute right; except that where a substitution is permitted, the lien of the former attorneys on any papers, for whatever sum is due to them, will be preserved. *N. Y. Superior Ct. Sp. T.*, 1866, *Hazlett v. Gill*, 5 *Rob.*, 611.
2. A change of attorneys, in an action, should only be by order of the court, and can only be made upon such terms as may be just; which, in special cases, may involve the payment of the attorney's costs. Generally the client has a right to change his attorney at his pleasure. *N. Y. Superior Ct. Sp. T.*, 1866, *Wolf v. Trockelman*, 5 *Rob.*, 611.
3. Where the court grant a motion for substitution of attorneys, on the application of a client, upon condition that the client pay the sum found by a reference to be due to the attorney, and the attorney, upon the sum

being thus liquidated, tenders a substitution, with the papers in the action, demanding payment of such sum, the court should not compel the party to accept the substitution and pay, by proceedings for contempt. *N. Y. Com. Pleas*, 1868, *Gardner v. Tyler*, *Ante*, 33.

4. An attorney can make a valid agreement with his client, by which his right to recover fees for his services is made contingent upon his success in the action. *Ct. of Appeals*, 1866, *Fitch v. Gardenier*, 2 *Keyes*, 516.
5. Where an agreement is made between an attorney and his client, providing for a large compensation if successful in the cause, even though the latter is informed that he must certainly succeed, the transaction is regarded by the law with great suspicion, and in case the meaning of the instrument is not transparently obvious, the client is entitled to a construction the most favorable of which it will admit. *Ct. of Appeals*, 1868, *Hitchings v. Van Brunt*, *Ante*, 272.
6. An agreement between attorney and client provided that an appeal from the decision of a surrogate should be taken to the supreme court, and that the attorney should attend and argue the same, and in case of success, and of the decision of the surrogate being reversed by the supreme court, his compensation was to be \$1,000 in addition to costs and allowances by the court. Another clause provided that in case it should be necessary "to contest" the case in the court of appeals, the plaintiff should have such further compensation as might be just, and a final provision that in case the defendant settled the case without his approval, he was to be immediately liable for the full compensation "as herein provided." The attorney was not successful on his appeal in the supreme court.—*Held*, that the agreement had performed its whole office the moment the decision against the appeal was given in the supreme court, and that he was entitled to nothing under it. *Ib.*
7. Where a judgment, reversing a judgment of the court below, contained a qualification, providing for an affirmance of the judgment appealed from upon the performance of a condition by the plaintiff, and the plaintiff did not consent to the correction, but appealed, with stipulations for absolute judgment against him, if the judgment should be affirmed, and it was affirmed,—*Held*, that it was too late for him to get the benefit of the condition fixed by the court below. *Ib.*
8. An attorney's agreement with his client to defend his suit for a specific sum does not affect the attorney's right to recover the taxable costs from the opposite party, though they exceed such sum; and if the client, after making such agreement, releases the opposite party, he makes himself liable to the attorney for the amount. *Supreme Ct. Circuit*, 1846, *Phenix v. Romer*, 1 *Edm.*, 353.
9. An attorney has no authority, without the knowledge and consent of his client, to consent to vacate a judgment which is pending and secured on appeal. Such an act being outside of the ordinary duties of an attorney, no advantage can be taken of such consent, either by the defendant or N.S.—VOL.V.—31.

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his sureties on appeal. *N. Y. Superior Ct. Sp. T.*, 1868, *Quinn v. Lloyd Ante*, 281.

10. A consent for substitution, given by an attorney to his client, precludes the attorney from acting subsequently in the action, notwithstanding the fact that no order has been entered on that consent. *Ib.*
11. Where an attorney purchased demands at a receiver's sale, declaring that the purchase was in the name of, and for another person, but, on such other person objecting to accept the purchase, took a transfer of the demand in his own name, for the purpose of bringing suit thereon,—*Held*, that this was a violation of 2 Rev. Stat., 288, § 58,—which forbids attorneys, &c., to buy, or be interested in buying, anything in action, with intent of bringing suit thereon. *Ct. of Appeals*, 1865, *Mann v. Fairchild*, 2 *Keyes*, 106.

BAIL.

One who has obtained possession of goods by a purchase induced by his fraud may be sued for the fraud without setting up the contract; and in such an action he may be arrested if the fraud is made out. [Distinguishing 1 Hill, 225.] *Supreme Ct. Chambers*, 1845, *Hayes v. Jones*, 1 *Edm.* 11.

BANKING.

Apportionment of liability of stockholders of an insolvent bank under the State law. *Hollister v. Hollister Bank*, 2 *Keyes*, 245.

BANKRUPTCY.

1. Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder. *N. Y. Com. Pleas Sp. T.*, 1868, *Goodwin v. Sharkey*, *Ante*, 64.
2. The bankrupt, therefore, cannot be arrested in proceedings under the act of 1831, of this State, known as the "Stilwell act," by a creditor seeking to reach the property of the bankrupt. *Ib.*
3. The primary object of civil proceedings under the Stilwell act is, not the punishment of the debtor, but the collection of the creditor's judgment; and, therefore, such proceedings are in direct conflict with the bankrupt law, as respects all property which passed to the assignee in bankruptcy. *Ib.*
4. Whether the lien acquired by the commencement of a creditor's suit to reach equitable interests and things in action, be regarded as attaching by the mere commencement of the suit, or only when judgment is obtained, a creditor claiming such a lien before judgment, under proceedings commenced before the enactment of the national bankrupt law, must dis-

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close such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien. *N. Y. Com. Pleas Sp. T.*, 1868, *Stewart v. Isidor*, *Ante*, 68.

5. A promissory note, given to induce a creditor to withdraw objections to a bankrupt's discharge under the act of Congress, is valid in the hands of *bona fide* holder without notice. *Supreme Ct. Circuit*, 1843, *Glenn v. Day*, 1 *Edm.*, 287.

BILL OF PARTICULARS.

The office of a bill of particulars is merely to limit the generality of a complaint, and prevent a surprise on the trial, but not to furnish evidence. In an action by brokers, against their clerks and one of their customers, to recover for moneys paid to the customer in consequence of false and fraudulent entries made by the clerks, the plaintiffs are not to be required to disclose, by a bill of particulars, the character, nature and purpose of the alleged false entries. *N. Y. Superior Ct.*, 1868, *Drake v. Thayer*, 5 *Rob.*, 694.

BILLS, NOTES AND CHECKS.

1. The words "or order," "or bearer," and "bearer," in notes, bills and checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words are used in place of naming a payee. *Ct. of Appeals*, 1867, *Mechanics' Bank v. Straiton*, *Ante*, 11.
2. An unlawful diversion is not to be presumed, but negotiation to a *bona fide* holder may be presumed where the paper bears the blank indorsement of the defendant. *Ct. of Appeals*, 1863, *Rice v. Isham*, 1 *Keyes*, 44.
3. The deposit in bank of money to pay a note drawn payable at such bank, is not a payment, nor does it preclude the holder from sustaining an action against the maker for the amount due. And in an action on such a note, it is not necessary to aver or prove demand of payment at the place at which the note was payable, nor is it necessary to aver or prove protest, as against the maker. *N. Y. Superior Ct.*, 1867, *Hill v. Place*, *Ante*, 181.

BOARD OF EDUCATION.

Of the power of boards of education to raise moneys for educational purposes by taxation. *Hasbrook v. Kingston Board of Education*, *Ante*, 399.

BUFFALO (CITY OF).

The provisions of the charter of Buffalo, section 9,—requiring an application of the majority of property-holders, in order to authorize an assessment for local improvements,—apply only to the improvements mentioned in that section, and do not apply to the other improvements mentioned by section 6 of title 8. *Ct. of Appeals*, 1864, *Ganson v. City of Buffalo*, 1 *Keyes*, 454.

CAUSE OF ACTION.

CARRIER.

1. In order to maintain an action against a common carrier for injuries to goods entrusted to him for transportation, it must be established that the property was *actually delivered* to him, by being placed in such a position that it might be taken care of by the carrier or his agent having charge of the business, and under his immediate control. To show that such agent was notified, does not make out a valid acceptance and delivery. The place of delivery is important, and due care must be used to leave the property where it is not exposed to danger. *Ct. of Appeals*, 1868, *Grosvenor v. N. Y. Central R. R. Co.*, *Ante*, 345.
2. Where merchandise is delivered to one of several connecting railroad companies, under a contract with such company, for its transportation to a point upon the road of another such company, the owner cannot maintain an action against the latter company founded upon the common law liability of carriers. *Supreme Ct.*, 1868, *Manhattan Oil Co. v. Camden, &c. R. R. Co.*, *Ante*, 289.
3. The remedy is only upon the contract, and the latter company are entitled to the benefit of any exceptions in the contract made with the former. *Ib.*
4. Where goods delivered to a steamboat company forming part of a continuous line, were marked "railroad line," the jury were instructed to determine, from the evidence as to the customary understanding of those words, whether they formed a part of the contract between the parties as to the forwarding of the goods. *Supreme Ct. Circuit*, 1845, *Read v. Ladd*, 1 *Edm.*, 100.
5. Where the consignee is absent from the terminus of the carrier's route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier, by depositing the merchandise in a warehouse; although it is otherwise of an intermediate carrier, whose duty it is to deliver to the next carrier on a road beyond. *Ct. of Appeals*, 1867, *Northrup v. Syracuse, &c. R. R. Co.*, *Ante*, 425.

CAUSE OF ACTION.

1. An action can be maintained by the maker of a note which was void in the hands of the payee, against the payee, if he has transferred it to a *bona fide* holder, and the maker has been thereby compelled to pay it. [1 *Cow. Tr.* 376; 12 *N. Y.* (2 *Kern.*), 313.] *Supreme Ct.*, 1868, *Newell v. Gregg*, 51 *Barb.*, 263.
2. Where the plaintiffs entrusted the defendant with their acceptances of his drafts, to be procured by him to be discounted, and to return the proceeds to the plaintiffs, for which he was to receive a commission;—*Held*, that the passing of such acceptances, for value and in good faith, to a third person by the agent, although a fraud on his principals, was not a

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- conversion of them to his own use, so as to make him liable for the amount to which they would be damnified by being obliged to pay them. The real cause of action consisted in the plaintiffs' agent making them liable for the drafts, against instructions. And the fact that the agent received the proceeds and applied them to his own use, did not compel the transferee to prove for what, and the mode in which, he received them. *N. Y. Superior Ct. Sp. T.*, 1866, *Wolfe v. Brouwer*, 5 *Rob.*, 601.
3. An action lies against one who pulls down without authority a fence illegally erected by a school district who have assumed to set apart the enclosure to a purpose not authorized by law. *Supreme Ct. Circuit*, 1845, *Rapelye v. Van Sickler*, 1 *Edm.*, 175.
 4. One to whose use money is applied which belongs to a third person, is liable therefor in an action by the latter, if he suspected and had reason to believe that it did belong to such person, and parted with no consideration on the faith of it. *Ct. of Appeals*, 1867, *Ely v. Norton*, 3 *Keyes*, 397.
 5. The law implies the release and discharge of a right of action where the creditor voluntarily delivers to his debtor the bond, note, or other evidence of his claim. [*Poth. Obl.*, n. 608, 609; *Bouv. Law Dic.*, title Release; 3 *Barr*, 251; 29 *Penn. Rep.*, 50.] *Supreme Ct.*, 1868, *Beach v. Endress*, 51 *Barb.*, 570.
 6. An action lies against a city railroad company for the negligence of their driver in respect to stopping the car and assisting young and infirm persons off and on. *Ct. of Appeals*, 1867, *Drew v. Sixth Avenue R. R. Co.*, 3 *Keyes*, 429.
 7. It is not proper to charge the jury in such a case that the responsibility of the carrier only commences when the passenger is actually on board the vehicle. *Ib.*
 8. The fact that a vendor of real property had committed a fraud upon the former owner, from whom he obtained title thereby, does not constitute a cause of action against such vendor, by a purchaser from him. A fraud does not form a claim on behalf of a stranger to the transaction, not claiming under the party defrauded. *Ct. of Appeals*, 1867, *Comstock v. Ames*, 3 *Keyes*, 357.
 9. Where the charter of a city requires the common council to make a compensation in money, within a fixed time, for land taken for purposes of local improvement, and makes the compensation thus due to the land owners a general debt or charge on the city, an action lies against the city therefor, after the time has expired, although the city have not collected the amount from the parties assessed. *Ct. of Appeals*, 1864, *Ganson v. City of Buffalo*, 1 *Keyes*, 454.
 10. In such a case, those to whom compensation is due are not restricted to a mandamus, as would be the case if the sum was payable only out of the assessments. *Ib.*

ACTION; COMPLAINT.

CHATTEL MORTGAGE.

CERTIORARI.

Under 2 Revised Statutes, 719, §§ 51-55, a prisoner convicted at special sessions, who obtains a certiorari to review the decision, may be let to bail until the final determination; but such bail requires him to appear at the next term of general sessions, and his appearance must be in person, and cannot be by attorney. *Supreme Ct. Chambers*, 1846, *People v. McCully*, 1 *Edm.*, 270.

CHATTEL MORTGAGE.

1. A chattel mortgage upon the merchandise and stock in trade of the mortgagor, expressed to include "the increase and decrease thereof," is wholly void. *Ct. of Appeals*, 1867, *Mittnacht v. Kelly*, *Ante*, 442.
2. Property embraced in the mortgage, although not a part of the stock in trade which was the subject of the increase and decrease spoken of, is not protected by the mortgage, and may be levied on under a judgment against the mortgagor. *Ib.*
3. Where property is transferred by a fraudulent conveyance subject to a chattel mortgage, the fact that the mortgage was not filed before the commencement of a creditor's action to set aside the fraudulent conveyance, does not impair the right of the mortgagee, if the plaintiff in the creditor's suit had not attached or levied on the property so as to acquire a lien. The statute declaring the chattel mortgage to be absolutely void if unfiled, as against the mortgagor's creditors, does not mean creditors at large. *Ct. of Appeals*, 1864, *Lane v. Lutz*, 1 *Keyes*, 203.
3. A mortgage by a railroad company, of its road and movable stock, need not be filed as a chattel mortgage. *Supreme Ct.*, 1868, *Hoyle v. Plattsburg & Montreal R. R. Co.*, 51 *Barb.*, 45.
5. Filing a chattel mortgage, with no other memorandum or statement than the words "no interest to date," is not sufficient under the statute (Laws of 1843, 403, § 3). *Supreme Ct. Circuit*, 1846? *Theriot v. Prince*, 1 *Edm.*, 219.
6. The memorandum indorsed upon refiling ought not to be in pencil, because of the facility for alteration. *Ib.*
7. One who makes a usurious mortgage may maintain trover against the mortgagee for selling the goods; and, if he bought them in, may recover the sums which it cost him to redeem them, or if entirely deprived of them, the amount of loss which it had been to him, taking into account the sum he had already received from the mortgagee. *Supreme Ct. Circuit*, 1847, *Leslie v. Hoffman*, 1 *Edm.*, 475.

COMPLAINT.

1. In an action against the maker of negotiable paper, payable to bearer, it is sufficient, after alleging that the defendants drew it, to allege that it was transferred and delivered to the plaintiff, without saying by whom, if it be also alleged that the transfer was for value, and that the plaintiff is the owner. *Ct. of Appeals*, 1867, *Mechanics' Bank v. Straiton*, *Ante*, 11.
2. Section 162 of the Code of Procedure,—providing that in an action on an instrument for the payment of money only, the pleader may give a copy, and state that there is due to him, from the adverse party, a specified sum, which he claims,—is to be construed in connection with section 142, which requires facts constituting a cause of action to be stated; and such a complaint must also show, directly or indirectly, that the defendant executed or delivered the instrument, and that it belongs to the plaintiff. As against the makers of a promissory note, it is sufficient to allege that the defendants made it, giving a copy of it, and that the plaintiffs are owners and holders thereof, and that the whole amount is due; but, in order to charge an indorser, it is not sufficient simply to add that the note was indorsed by him. His promise is conditional, and his liability depends upon facts outside of the instrument. An action as against him is founded on something more than an instrument for the payment of money only. Payment of the note must be first properly demanded by the makers, and due notice given to the indorser before any legal liability attaches to the latter; and it is incumbent upon the pleader to state these facts. *Ct. of Appeals*, 1864, *Conkling v. Gandall*, 1 *Keyes*, 228.
3. In an action in the nature of an action of trover, brought for the conversion of personal property belonging to the plaintiff's assignors, all that is necessary to allege in the complaint is, that the plaintiff's assignors were the owners of the property, that it had come into the possession of the defendant, and that he had converted it to his own use. If, in addition to this, the plaintiff sees fit to state his own title,—namely, the original ownership of his assignors, and the form of a fraudulent sale to the defendant's assignor, who wrongfully delivered the property to the defendant, adding an allegation of refusal to deliver, these averments may be regarded as unnecessary, and the complaint cannot be dismissed on the ground that it does not state that the defendant wrongfully received the property from the fraudulent buyer. *Ct. of Appeals*, 1864, *King v. Fitch*, 1 *Keyes*, 432.
4. *It seems*, that where goods come rightfully into the possession of a party, as a mere bailee in good faith, and they are subsequently wrongfully detained, it is necessary, in an action for their wrongful detention, to allege a demand of the goods. *N. Y. Superior Ct. Sp. T.*, 1867, *Purves v. Moltz*, 5 *Rob.*, 653.

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5. But where goods come to the possession of a party by a mistake of which he is fully aware at the time, and subsequently, for voluntary repairs put by him upon the property, he claims a lien thereon, for which he detains it, he becomes a wrongdoer from the beginning, and consequently liable in an action for a wrongful taking and detention, and no demand for the delivery need be alleged. *Ib.*
6. The complaint in an action for deceit or fraud in the purchase or sale of property induced or procured by false representations, must in substance state the representations, and aver their falsity, and that they were made with the intent to deceive the plaintiff, and induce him to make the purchase in question, and that they did induce such trade, to the plaintiff's injury. *Supreme Ct.*, 1867, *Barber v. Morgan*, 51 *Barb.*, 116.
7. No allegation of fraud is necessary in the complaint in an action founded on a warranty; and any allegations of fraud, in such a complaint, when not essential, may be disregarded; nor is the allegation that a warranty was made *in order to deceive* the plaintiff, necessary to the cause of action. Where the complaint alleges a warranty, a sale on the faith of it, the existence of a defect warranted against, and damages thereby, these allegations complete a cause of action on which the plaintiff is entitled to recover; unless in his complaint he rejects such warranty, and its obligations as a contract, and limits the introduction of it to its use as a mere instrument of deception. *N. Y. Superior Ct.*, 1867, *Quintard v. Newton*, 5 *Rob.*, 72.
8. A complaint alleging that the defendant made certain representations in reference to property to be sold, and that the plaintiff, being ignorant of the truth or falsity of them, believed them, and purchased on the faith thereof, but that such representations were false and untrue, and the defendant well knew them to be so from the beginning, and that he thereby falsely and fraudulently deceived the plaintiff in the sale, &c., does not sufficiently allege the intent to deceive. The plaintiff must in substance aver, not only that the defendant made the representations to induce the plaintiff to purchase, but that they were intended to defraud or deceive him. It is sufficient, however, if such allegation can be fairly gathered from all the statements in the complaint, although the statement may be argumentative, and the complaint deficient in technical language. *Supreme Ct.*, 1867, *Barber v. Morgan*, 51 *Barb.*, 116.
9. Under the statute in relation to suits by and against companies and associations (Laws of 1849, ch. 253, § 4, as amended by Laws of 1853, ch. 153),—which authorizes actions against the members of such associations after judgment and execution exhausted against the association itself,—the cause of action given against the individual members is not the judgment recovered against the association, but the original cause of action or debt. The complaint in an action against the individual members in such case should set forth such facts as are sufficient to show the original cause of action against the association, in addition to those made necessary by the act, showing the attempt and failure to collect the de-

COMPLAINT.

- mand by judgment and execution, out of the property of the association. *Ct. of Appeals*, 1867, *Witherhead v. Allen*, 3 *Keyes*, 562.
10. Alleging that at a given time the company became indebted to the plaintiff in a specified sum for goods sold and delivered, and alleging judgment and execution unsatisfied, is not sufficient. The plaintiff cannot recover against the members upon the judgment; and alleging the contract, without alleging a breach of it, does not show the cause of action. *Ib.*
 11. If the pleader, in setting forth his cause of action, does in fact show a good cause of action, although not the one intended, his pleading will, nevertheless, be sustained upon demurrer, for it is to be measured, not by his view of the law, but by the law itself. *Ib.*
 12. In an action against the trustees of a manufacturing company, under section 12 of the general act,—which renders them liable for the debts of the corporation in case of their neglect to file the annual report required by the act,—the debt, within the meaning of the statute, is the original debt contracted by the corporation, and not any judgment which the creditor may have recovered thereon against the corporation; and it is unnecessary to allege such a judgment against the corporation in an action against the trustees. The judgment does not extinguish the debt in such a sense as to exonerate the trustees from liability, nor is it a material fact in the action against them. *N. Y. Superior Ct.*, 1867, *McHarg v. Eastman*, 35 *How. Pr.*, 205.
 13. But it is essential to aver in such a complaint that the debt was existing at the time the trustees were in default by omitting to publish the report, or that it was contracted afterwards. *Ib.*
 14. It must be averred in the complaint that the defendant was a trustee at the time of default; and an allegation that he was president of the corporation, *it seems*, is not sufficient. *Ib.*
 15. The complaint in an action by the receiver of an insurance company, organized under the general law applicable to such companies, which, being insolvent, has distributed its capital among its stockholders, in fraud of its creditors, need not aver that such distribution was made with an intent to defraud its creditors. *Ct. of Appeals*, 1867, *Osgood v. Laytin*, *Ante*, 1.
 16. Where a defendant omits to move to make definite and certain, or to strike out irrelevant or redundant matter, it may be assumed upon the trial that he fully understands, for the purpose of his defense, the nature of the charge against him, and is prepared to meet it. Nor is anything contained in the complaint to be rejected as irrelevant or redundant, provided it relates, and is material to, some cause of action. *N. Y. Superior Ct.*, 1867, *Quintard v. Newton*, 5 *Rob.*, 72.

CONFESSION OF JUDGMENT.

COMPROMISE.

Nature and effect of compromise in a peculiar case. *Mann v. Palmer*, 2 *Keyes*, 177.

CONFESSION OF JUDGMENT.

1. If a statement is sufficiently explicit, within the language and meaning of the Code, the omission of a schedule therein referred to as "annexed," will not invalidate the judgment. *Ct. of Appeals*, 1864, *Clements v. Gerow*, 1 *Keyes*, 297.
2. A statement is sufficient to authorize a judgment by confession under section 383 of the Code of Procedure, which states facts on which the indebtedness arises, thus, "A promissory note (giving amount and date), being for money loaned me by plaintiff to commence business as a merchant."

Or thus: "A promissory note (stating amount and date) being for money paid by plaintiff for me on the real estate I now own at Irving."

Although these statements do not specify the amount loaned or paid, the terms of the loan, or the name of the person to whom the advance was made, or whether in one or more sums, yet without these particulars the statements satisfactorily identify the transaction. It is the *general* facts out of which the indebtedness arose, and not a particular specification of these facts, which the law requires. There must be enough to identify the transaction, if there really was one, so that the parties interested may make further inquiries respecting it; and allegations enough, if true, to show that the amount for which the judgment was confessed was justly due. *Ct. of Appeals*, 1864, *Acker v. Acker*, 1 *Keyes*, 291.

3. The following confessions are sufficient :

"This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: For money lent by said plaintiff to me on the first day of April, 1856, and interest thereon from the first day of April, 1857."

"This confession of judgment is for a debt justly owing from me, and due to the plaintiff, arising from the following facts: For money borrowed by me of him in June, 1855, for which I gave him my note, and one year's interest thereon."

"This confession of judgment is for a debt justly due and owing from me to the plaintiffs, for goods, wares, and merchandise, groceries, dry goods, salt, calico, muslin, molasses, sugar, and other articles sold and delivered by them to me, at various times within the two last years, as per schedule annexed," although no schedule was in fact annexed to the confession. *Ct. of Appeals*, 1864, *Clements v. Gerow*, 1 *Keyes*, 297.

CONSTABLE.

1. A constable levying upon the interest of defendant in execution, in property legally held by a third party in virtue of an existing lien, cannot remove the property from the possession of such third party; and if he does so he will be liable therefor. *Ct. of Appeals*, 1864, *Truslow v. Putnam*, 1 *Keyes*, 568.
2. In an action against a constable for neglecting his duty as an officer, in returning unsatisfied an execution, which he might have collected, upon a judgment in favor of the plaintiff, it was proven that after the execution was issued the defendant was directed to seize certain property and sell it, without regard to whether it was exempt from execution or not. A bond of indemnity being demanded by him, it was executed and delivered to him, and he accepted it and proceeded to take an inventory of a part of the property. A motion for a nonsuit being made on the ground that the defendant in execution was a householder, and was not shown to have had any property not exempt from execution,—*Held*, that conceding the defendant in execution to be a householder, the burden of proving that she had no property except what was exempt from execution, was upon the person claiming the exemption as a defense,—and there was no error in denying a motion for nonsuit. *Supreme Ct.*, 1868, *Baker v. Brintrall*, *Ante*, 253.
3. The question of exemption is a statutory privilege, and is strictly personal; it therefore would not avail the defendant, if proved. *Ib.*
4. Inasmuch as the question of exemption was one the defendant could not raise in his case, the acceptance of the execution, and the bond of indemnity, with his consent to act on the execution, and his acting so far as to take an inventory of the property of the defendant in execution, bound him to go on and act as instructed, and estopped him from returning the execution unsatisfied. *Ib.*

CONSTITUTIONAL LAW.

1. It is competent for the legislature, under the constitution of this State, to establish in cities justices' courts, the justices to be elected by the voters of the city, and their civil jurisdiction to be deemed that of justices of the peace of counties. *Supreme Ct.*, 1868, *Dawson v. Horan*, 51 *Barb.*, 459.
2. A statute increasing the civil jurisdiction of justices' courts is not obnoxious to the objection that it violates the constitutional provision securing trial by jury, by reason of the circumstance that it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts, in which they consist of six. The right of trial by jury remains unimpaired in such courts. *Supreme Ct.*, 1868, *Dawson v. Horan*, 51 *Barb.*, 459.

CONTRACTS.

3. The provision of the charter of Buffalo requiring the appointment of one of the city assessors on a commission of assessment for local improvements is unconstitutional; but this objection is not available to avoid the proceedings, if it does not appear that such appointment was made; and *it seems* that the unconstitutionality of the requirement of such appointment does not make it illegal for the court in its discretion to make such an appointment. *Ct. of Appeals*, 1864, *Ganson v. City of Buffalo*, 1 *Keyes*, 454.

CONTEMPT.

1. A debtor who, after the service of the usual order in supplementary proceedings, enjoining him from disposing of his property, draws out money previously deposited in bank under an account opened in his name "in trust," and applies a part of such money to his own use, or that of his family, is liable to be punished therefor as for contempt. *Ct. of Appeals*, 1867, *People ex rel. Noel v. Kingsland*, *Ante*, 90.
2. He cannot avoid such punishment by urging that he was doing business as agent for his wife, and that the funds were held by him in trust for her. The legal title, nevertheless, under such a deposit in his own name "in trust" was in himself. *Ib.*
3. Where the amount withdrawn was \$356, —*Held*, that a fine of \$400 was not unreasonable to indemnify the creditor. *Ib.*
4. Either house of Congress may issue their warrant or attachment, to bring before it, for the purpose of giving necessary evidence in legislative proceedings, a witness charged with contempt, and by such process may take him from the custody of a sheriff by whom he is imprisoned on execution in a proceeding in a State court. Congress is not restricted to proceeding by *habeas corpus* in such cases. *Ct. of Appeals*, 1864, *Wilckens v. Willett*, 1 *Keyes*, 521.

CONTRACTS.

1. A contract between a creditor, an attorney, and a third person, that the creditor should assign his demand to such third person, and that it should be prosecuted in the name of the latter, who should, however, have no interest in the recovery, and that the attorney should pay him a specified sum whenever the action was determined, and pay his necessary expenses in attending court, and save him harmless from all costs, is a valid agreement. Such an act, although it amounts to maintenance, is no longer illegal in this State, and it is not obnoxious to objection because it is an agreement to aid another in the prosecution of a claim, if it be made in good faith. Nor is such an agreement contrary to the statute (2 Rev. Stat., 288, §§ 71-3), forbidding attorneys, &c., to buy rights in action or advance money thereon to prosecute. *Supreme Ct.*, 1863, *Voorhees v. Dorr*, 51 *Barb.*, 580.
2. The promise of a third person to an attorney in an action for divorce, to

CORPORATIONS.

- pay his fees on condition of his discontinuing the action and a motion for alimony, pursuant to a settlement agreed upon by the parties, is not a promise to answer for the debt, default or miscarriage of another, under the statute of frauds, but is an original undertaking upon which an action will lie. *N. Y. Com. Pleas*, 1868, *Prentice v. Wilkinson*, *Ante*, 49.
3. In determining whether the statute of frauds applies to a sale of goods, delivered to one person at the request of another, the true test is, whether there is any liability of the vendee to the vendor, for if there is, then the promise of the guarantor is collateral, and must be in writing. Where the sale was entered on the vendor's books as "sold A. B.,—C. D. security," and the bill was made out thus: "A. B. (through C. D.), bought of," &c., and it was shown that the vendors had urged C. D. to get security from A. B., and offered to pay him for so doing,—*Held*, that C. D. could not be regarded as the principal debtor. *Supreme Ct. Circuit*, 1845, *Read v. Ladd*, 1 *Edm.*, 100.
 4. Individuals indebted upon drafts,—*Held*, not released by a creditor receiving bills and notes of a company to be discounted, and the proceeds used in liquidation, the circumstances indicating that the extension of time was made in pursuance of an arrangement to which the defendant was a party. *Ct. of Appeals*, 1863, *Rice v. Isham*, 1 *Keyes*, 44.

CONVERSION.

A refusal to deliver plaintiff's property to him upon demand, may be left to the jury as evidence of a conversion before the bringing of an action, although the demand was made after the papers were delivered to the sheriff. *Ct. of Appeals*, 1864, *Jessop v. Miller*, 1 *Keyes*, 321.

COPYRIGHT.

1. A written work consisting wholly of directions set in order for conveying the ideas of an author on a stage by actors, is as much a dramatic composition, within the protection of the copyright act, as if language or dialogue were used; and the author, having a copyright in his drama, is entitled to protection in respect to a substantial, material, original part thereof, although the act of 1856,—providing for copyright of dramatic composition,—does not, like the act of 1831, use the words "in whole or in part." *U. S. Circuit Ct. N. Y.*, 1868, *Daly v. Palmer*, *Ante*, 134, note.
2. The sale as well as the representation of the drama may be enjoined. *Ib.*

CORPORATIONS.

1. A clause in the original articles of association of a company, prohibiting the union or consolidation of that company with any other, without the consent of a majority of the stockholders, is not controlled by a clause contained in those articles, providing for an amendment of the original

COSTS.

- articles by a concurrent vote of two-thirds of the executive committee and a majority of the trustees, so as to allow such officers to repeal the restriction upon consolidation. Such authority to amend extends only to such amendments as are pertinent to the business and objects for which the association was organized. *Supreme Ct. Sp. T.*, 1869, *Blatchford v. Ross*, *Ante*, 434.
2. The president of a company, by virtue of his office, has power to collect subscriptions to the capital stock. *N. Y. Superior Ct.*, 1868, *East New York, &c. R. R. Co. v. Lighthall*, *Ante*, 458.
 3. In the absence of any statutory restrictions, a corporation has power to receive payment otherwise than in money for subscription to the capital stock. *Ib.*

COSTS.

1. In an action of a legal nature, to recover possession of land, if the defendant succeeds upon an equitable defense by which he is entitled to be relieved from a forfeiture, the costs are chargeable to the plaintiff, and the court have no discretion except as to the costs of appeal. *Supreme Ct.*, 1864, *Cythe v. La Fontain*, 51 *Barb.*, 186.
2. In an equity case the award of costs is in the discretion of the referee, and the appellate court will not control that discretion, except, perhaps, in case of its palpable abuse. *Ct. of Appeals*, 1867, *Barker v. White*, *Ante*, 124.
3. Where the plaintiff in such an action made two claims, and recovered the smaller one only, and the referee allowed him his costs and one-third of his disbursements, and charged him with the costs of the successful defendant,—*Held*, that the court of appeals would not interfere with this adjustment. *Ib.*
4. A common law *certiorari* belongs to the class of special proceedings embraced in section 3 of the Code; and costs of appeal may be awarded thereon in the appellate tribunal. [Code, §§ 3, 318; Laws of 1854, 593, § 3; 19 *N. Y.*, 532; 21 *Id.*, 86; 27 *How.*, 158; 14 *Id.*, 527.] *Ct. of Appeals*, 1866, *People v. Van Alstyne*, 3 *Keyes*, 35.
5. Defendants sued on the same instrument, who both appear by the same attorney, and interpose substantially the same defense, although by separate answers, can be allowed only one bill of costs, on prevailing in the action. *Supreme Ct.*, 1868, *Atkins v. Lefever*, *Ante*, 221.
6. Where, in an action brought by a receiver appointed in supplementary proceedings, to set aside a conveyance of real estate made by the judgment debtor to a third person, the defendant succeeds on the trial, the judgment creditors of the debtor, who are not parties to the action, and took no part in its prosecution, are not liable for the costs of such action. *N. Y. Superior Ct. Sp. T.*, 1866, *Cutter v. Reilly*, 5 *Rob.*, 637.
7. The law making parties in interest liable for costs was not intended to apply to actions brought in the name of sheriffs, receivers, clerks, or

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other officers of the court, although third parties may be interested in the recovery ; unless the action be brought on the sole suggestion and urgency of such parties, and be virtually conducted by them ; especially the statute is not applicable if the action be brought by direction of a court. *Id.*

8. Under section 243 of the Code of Procedure,—which entitles the sheriff to poundage on the amount paid on the settlement of an attachment suit,—he is entitled to such a charge upon the discontinuance of a suit on an agreement to pay the amount sued for. *Supreme Ct.*, 1868, *Pritchard v. Bank of California*, 51 *Barb.*, 184.

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1. A judgment of the supreme court, after the hearing on the return to a mandamus to tax assessors, quashing the writ on the ground that the assessors have kept within the boundaries prescribed by the statute for their action, may be reviewed on appeal in the court of appeals. Such a judgment is not merely an exercise of discretion. *Ct. of Appeals*, 1868, *People v. Board of Assessors*, 39 *N. Y.*, 81.
2. An appeal from an order of the supreme court, opening a judgment in foreclosure, dismissed, as taken from an order which was not appealable. *Ct. of Appeals*, 1865, *McReynolds v. Munns*, 2 *Keyes*, 215.
3. An order directing that unless defendants, charged with a violation of a preliminary injunction, do certain acts, an attachment issue against them for a violation, the order having been granted on an application made before judgment, is not appealable to the court of appeals. Such an order is made in the action, and not in a special proceeding, and although it may affect a substantial right, yet it is not final. *Ct. of Appeals*, 1866, *New York, &c. R. R. Co. v. Ketchum*, 3 *Keyes*, 24.
4. Where the supreme court at general term, upon the hearing of exceptions, deny a new trial, and order judgment for the plaintiff on the verdict, the judgment is appealable to the court of appeals. *Ct. of Appeals*, 1868, *Juliand v. Rathbone*, 39 *N. Y.*, 369.
5. After a trial by a referee, in order to review his final decision in the court of appeals, a case must be made, containing the facts found by him, with his conclusions of law and the appellant's exceptions. A document containing the evidence and the opinion of the referee upon the principles which should govern the accounting, is not sufficient. *Ct. of Appeals*, 1866, *Goodyear v. Bishop*, 2 *Keyes*, 651.
6. This court cannot review the decision of a referee where the facts are not found, nor his legal conclusions stated and properly excepted to. *Ct. of Appeals*, 1865, *Stratton v. Cornfield*, 2 *Keyes*, 55.
7. Where a case does not contain any exception, the judgment cannot be reviewed in this court. [13 *N. Y.* (3 *Kern.*), 341; *Id.*, 344; *Id.*, 434; 15 *Id.*, 590.] *Ct. of Appeals*, 1867, *Douglass v. Day*, 3 *Keyes*, 434.
8. Where no exceptions are taken in the court below, there is no case before the court to review. A memorandum at the end of the case, stating

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- that either party is at liberty to turn the case into a bill of exceptions, is of no avail without exceptions taken. *Ct. of Appeals*, 1866, *Bissell v. Studley*, 3 *Keyes*, 213.
9. The court of appeals cannot review a case tried before a referee, except upon the facts actually found by him. If a party deems it necessary to have a fact found one way or the other, he must apply to the supreme court to compel such finding. A refusal to find one way or the other, and an exception to such refusal, presents no point for review in this court. *Ct. of Appeals*, 1866, *Priest v. Price*, 3 *Keyes*, 222.
10. Where, by an inadvertence of counsel, the facts are presented in such a manner that it is impossible, without violating well-settled rules of practice, to do justice between the parties, the court of appeals have power to suspend the judgment on an appeal in that court, in order to enable the party whose rights might otherwise suffer to apply to the court from whose judgment the appeal was taken for a resettlement of the case. *Ct. of Appeals*, 1863, *Rice v. Isham*, 1 *Keyes*, 44.
11. This court will not send back a case to the court below, to amend its order by reversing the findings of fact, though it appear from the opinion of the court below that it was the *intention* to reverse those findings, if the order of reversal fails to express that intent. *Ct. of Appeals*, 1865, *Thompson v. Menck*, 2 *Keyes*, 82.
12. Questions of fact found by a judge at special term, may be reviewed by the supreme court on appeal. But if the supreme court affirm the decision of such questions, the court of appeals cannot review it. *Ct. of Appeals*, 1867, *Waters v. Green*, 3 *Keyes*, 385.
13. The objection that the decree in a creditor's suit renders a third person, who is made a defendant, liable by reason of an apparent indebtedness to the debtor, while the indebtedness is in reality to a stranger, must be raised in the court below, and cannot obtain in the first instance in the court of appeals. *Ct. of Appeals*, 1868, *Durand v. Hankerson*, 39 *N. Y.*, 287.
14. If a motion for a temporary injunction is denied, not on the ground that the plaintiffs could ultimately have no relief, but because a temporary interference was not deemed advisable by the court to which the application was made, the court of appeals will not review the discretion of that court upon the question. *Ct. of Appeals*, 1867, *Hasbrook v. Kingston Board of Education*, *Ante*, 399.
15. An objection to the authority of an agent, which was not specifically made on the trial, cannot be raised on the argument in the court of appeals. *Ct. of Appeals*, 1868, *Wolfe v. Security Fire Ins. Co.*, 39 *N. Y.*, 49.
16. An objection to the constitutionality of a statute will not be considered in the court of appeals, unless it is essential to the determination of the appeal. [6 *N. Y.* (2 *Seld.*), 176.] *Ct. of Appeals*, 1865, *People v. Board of Supervisors*, 2 *Keyes*, 288.
17. In this court the report of a referee, so far as it involves questions of

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- fact, is not open for review, even though it is suggested that the referee utterly discarded the evidence, and came to a wrong result upon undisputed facts. *Ct. of Appeals*, 1866, *Chamberlain v. Prior*, 2 *Keyes*, 539.
18. If the findings of a referee are not without evidence to support them, they are conclusive upon this court, and are not subject to review here. [12 N. Y. (2 Kern.), 258; 19 *Id.*, 207; 14 *Id.* (4 Kern.), 310; 4 *Id.* (4 Comst.), 284; 13 *Id.* (3 Kern.), 587; 18 *Id.*, 573.] *Ct. of Appeals*, 1868, *Ostrander v. Fellows*, 39 *N. Y.*, 350.
19. In an action of an equitable nature, to close the affairs of a copartnership, the court of appeals can only review questions of law raised in the court below upon rulings to which proper exceptions were taken. *Ct. of Appeals*, 1867, *Shaw v. Smith*, *Ante*, 129.
20. Exceptions which present questions of fact only, or relating to the admissibility of evidence, without stating the ground of objection, are not available. *Ib.*
21. In such a case, however, the court affirmed the judgment without awarding damages on appeal to the respondent, in consideration of the appellant's case being a hard one. *Ib.*
22. Where a referee in his report has found, as a question of fact, that the title and the right to convey were in the vendor at the time the conveyance was made, this court will not review the evidence in the case, in order to ascertain whether such conclusion is or is not erroneous. *Ct. of Appeals*, 1865, *Farnham v. Hotchkiss*, 2 *Keyes*, 9.
23. This court is bound to take the facts as they are stated in the case to have been found by the judge or referee, and compare the judgment rendered with the statements of fact; and if the judgment is in conformity with the facts as found, it cannot be disturbed. *Ib.*
24. The court of appeals cannot reverse a judgment by reason of defects in the pleadings which did not affect substantial rights. They must treat a variance as immaterial, in the absence of affirmative evidence that it misled the adverse party. *Ct. of Appeals*, 1866, *Johnson v. Hathorn*, 3 *Keyes*, 126; S. C., 2 *Id.*, 476.
25. The court of appeals will not reverse a judgment entered on the report of a referee, on the ground that the action was not referable, if it be one that *might* require the examination of a long account, and the affidavits on which it was ordered are not brought before the court on appeal. The presumption is that the necessary facts were shown. *Ct. of Appeals*, 1864, *Van Marter v. Hotchkiss*, 1 *Keyes*, 585.
26. On appeal to the court of appeals from a judgment of the supreme court reversing a judgment upon a report of a referee, if it is not stated in the judgment of reversal that the judgment below was reversed on questions of fact, the court of appeals cannot examine the evidence and affirm the judgment on the ground assigned in the opinion of the supreme court that the finding of the referee was against the evidence. *Ct. of Appeals*, 1868, *Case v. Phelps*, 39 *N. Y.*, 164.

CREDITOR'S ACTION.

27. Where the court below decided as matter of law that the counter-claim set up by defendant could not be allowed in the action, but the ground of such ruling did not appear,—*Held*, that as it appeared from the case on appeal that the counter-claim might have been one which should be allowed, the ruling should be presumed to have been a refusal to submit any question to the jury in regard to it, and that the judgment should be reversed. *Ct. of Appeals*, 1868, *International Bank v. Monteith*, 39 *N. Y.*, 297.
28. Judgment affirmed with *ten per cent. damages* where the appeal was wholly without merit. *Wright v. Saunders*, 3 *Keyes*, 323; *S. C.*, 36 *How. Pr.*, 136.
29. Judgment affirmed, of course, where the appellants fail to appear and submit points. *Smith v. Martin*, 3 *Keyes*, 373.

AMENDMENT, 13; APPEAL; EXCEPTIONS; ERROR; SUPREME COURT.

COURTS OF SESSIONS.

The court of general sessions of the city of New York has the power to grant new trials. The act of 1859 (Laws of 1859, ch. 339, § 4),—which grants to the “courts of sessions of the several counties” of the State the power to grant new trials,—is broad and comprehensive enough to include the court of general sessions of New York city. *Ct. of Appeals*, 1867, *Lannergan v. People Ante*, 113.

COVENANT.

A covenant that the whole amount of a judgment is due, is not to be construed to mean that no one of the judgment debtors has been released. *Supreme Ct.*, 1868, *Bennett v. Buchan, Ante*, 412.

CREDITORS' ACTION.

1. Property bought by the husband as the agent of his wife, with her money, and afterwards, in good faith and without intent to defraud creditors, sold by him as her agent at a profit, is not subject to the claims of the creditors of the husband to the extent of the profit, on the ground that the profit was the result of his skill or ability. *Ct. of Appeals*, 1867, *Merchant v. Bunnell*, 3 *Keyes*, 539.
2. Profits derived from an investment of the money of the wife in her name, are to be regarded as belonging to her, although they were secured by the agency of her husband in the management of the business. *Ib.*
3. *It seems*, that the lien acquired by the commencement of a creditor's suit to reach equitable interests and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained. *N. Y. Com. Pleas Sp. T.*, 1868, *Stewart v. Isidor, Ante*, 68.

CRIMINAL LAW.

4. If it be otherwise, a creditor claiming such a lien under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien. *Ib.*
5. Where, in a creditor's bill filed to compel the application of choses in action, equitable interests, &c., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance of land to B., who is also a party, and it is claimed that the deed should be set aside, and it appears that the conveyance was made in good faith, but that B. gave to A. a mortgage thereon, which is unpaid, it is competent for the court to decree that B. pay such mortgage to the receiver, to be applied on the judgment, although such mortgage was not named in the bill or in the prayer for relief. *Ct. of Appeals*, 1868, *Durand v. Hankerson*, 39 *N. Y.*, 287.
6. In such case, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and the evidence tended to show an assignment by A. to him; still, it being proved and found that such assignment was fraudulent, it was proper to require B. to pay the mortgage to the receiver. *Ib.*
7. The objection that such third person should have been made a party, and that B. may hereafter be called upon to pay the mortgage to him, is waived by B., if he does not make it by answer or demurrer. *Ib.*

COURT OF APPEALS, 13.

CRIMINAL LAW.

1. To sustain the plea of a former acquittal as a defense to an indictment, it must appear that the party was "put in jeopardy" by the former trial. *Ct. of Appeals*, 1867, *Canter v. People*, *Ante*, 21.
2. The objection that on the trial of an indictment for murder, alleged to have been committed in the city of New York, the evidence showed that the murder was committed in Broome street, without proof that Broome street was in that city, that being assumed to be the case by defendant's counsel, cannot be first raised on appeal. So, also, of the objection that the witnesses did not state in what year the offense was committed, if it was assumed upon the trial that it was committed in the year specified in the indictment, being the year in which the indictment was found. *Ct. of Appeals*, 1866, *Wagner v. People*, 2 *Keyes*, 684.
3. A general verdict of guilty, rendered upon a common law indictment for murder, authorizes, under the laws of this State, a judgment and sentence for murder in the first degree. *Ct. of Appeals*, 1868, *Kennedy v. People*, *Ante*, 147.

INDICTMENT; EVIDENCE; WITNESS.

DAMAGES.

CURTESY.

1. The estate of tenancy by the curtesy still exists in this State, notwithstanding the statutes of 1848 and 1849, known as the Married Woman's Acts. *Supreme Ct. I. Dist.*, 1863, *Burke v. Valentine*, *Ante*, 164.
2. Those statutes have not interfered with the right of the husband to the personal estate, or the estate by curtesy, in the real property of the wife, after her death, if not disposed of by her, either during life, or by will to take effect at her death. *Ib.*

DAMAGES.

1. On a contract which is expressed to be for the payment of a specified number of dollars, the measure of damages is that sum in legal tender, though, in the contract, the words "in gold or silver coin" be added. *Supreme Ct.*, 1867, *Murray v. Gale*, *Ante*, 236.
2. It would be otherwise of a contract to pay or deliver a certain quantity and quality of coin. *Ib.*
3. In an action against a warehouseman for the conversion of goods, interest on the value of the goods (if allowed by the jury) is recoverable, by way of damages; it being an action for a breach of duty. *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
4. After the dissolution of a copartnership, J. B., one of the partners, without the authority or assent of S. R., the other, assigned for \$100 a judgment which had been obtained before the dissolution. The assignment was executed under the firm name.—*Held*, that the assignment was effectual to vest in the assignee all the interest and title of both partners in the judgment, but not to make S. R., who did not sign the instrument, liable on the covenants contained therein. *Supreme Ct.*, 1868, *Bennett v. Buchan*, *Ante*, 412.
5. The assignment contained covenants "that there is now due on said judgment the sum of \$1,038.46, and interest from Sept. 2, 1861," and "that they (J. B. & Co.) will not collect or receive the same, nor any part thereof, nor release or discharge the said judgment." The whole amount of the judgment, as docketed Sept. 2, 1861, was \$1,038.46. Before the dissolution, S. R., in consideration of *ten per cent.* of the judgment, had executed in the firm name, without the knowledge of J. B., a release under chap. 257, *Laws of 1838*, whereby one of the four judgment debtors was exonerated from all liability. It was found after the assignment that the exonerated debtor was solvent, and able to pay the whole debt. The other judgment debtors were dead or insolvent, except one, from whom the assignee of the judgment collected \$102.16, on execution.—*Held*, that the plaintiff's measure of damages against the defendant, J. B., for breach of the covenant, was *ten per cent.* of the judgment,—*i. e.*, \$103.84, and

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- interest from Sept. 2, 1861,—and that the \$102.16 could not be applied in reduction thereof. *Ib.*
6. In an action by an administrator to receive for injuries resulting in the death of the intestate, for the benefit of the next of kin, who consist of brothers, sisters, nephews and nieces, it is not error to refuse to confine the jury to the nominal damages, and to instruct them that the amount recovered will be for the exclusive benefit of the next of kin, and that the damages should be a fair and just compensation, with reference to the pecuniary injuries resulting from the death of the deceased, to her next of kin; and that whether the next of kin would ever have been benefited pecuniarily by her living, was not certain, but speculative, or matter of conjecture. *Ct. of Appeals*, 1864, *Dickens v. New York Central R. R. Co.*, 1 *Keyes*, 23.
 7. Where a person is wrongfully arrested in one State, by the officer of another State, without warrant, it is proper to charge the jury that in estimating the damages, they may take into consideration the continued imprisonment of the plaintiff after he had been carried beyond the State line. The imprisonment in a foreign State is a continuance of a wrong which was commenced by the unauthorized arrest here. *Supreme Ct.*, 1865, *Mandeville v. Guernsey*, 51 *Barb.*, 99.

DEFENSES.

1. The defendant, in an action to foreclose a mortgage given for purchase money, cannot set up as a defense a failure of title to the mortgaged premises, or to part of them, where there has been no eviction or disturbance of his possession of such premises. *Ct. of Appeals*, 1865, *Farnham v. Hotchkiss*, 2 *Keyes*, 9.
2. A transfer of the subject of action, pending the action, although made in pursuance of an executory contract entered into before the action, there having been a breach of condition precedent therein before the action, does not abate the action. *Ct. of Appeals*, 1868, *Van Rensselaer v. Berringer*, 39 *N. Y.*, 9.
3. In an action for divorce, on the ground of the nullity of the marriage, the defendant cannot have leave to allege, by way of amendment, that plaintiff was insane at the commencement of the action, for this is not an issuable fact. *Supreme Ct.*, 1868, *Appleton v. Warner*, 51 *Barb.*, 270.
4. The court will not disturb a verdict which is perfectly proper upon the pleadings as they stand, to let in a new defense, of which the plaintiff had no notice until after the evidence on both sides at the trial had closed. *N. Y. Superior Ct.*, 1866, *Bunge v. Koop*, 5 *Rob.*, 1.
5. In what cases a purchaser of land, when sued for possession on account of his default in payment, may be relieved from the forfeiture. *Cythe v. La Fontain*, 51 *Barb.*, 186.

DEPOSITIONS.

DEMAND BEFORE SUIT.

1. If the defendant does not object to the sufficiency of a demand, and refuses to deliver up the property for improper reasons, a further demand will be unnecessary. *Ct. of Appeals*, 1864, *King v. Fitch*, 1 *Keyes*, 432.
2. The provision of 2 Rev. Stat., 505, § 1,—that if no sufficient distress be found on the premises to satisfy rent, the landlord, having a subsisting right of re-entry for non-payment, may bring ejectment without other demand than the service of declaration,—applies to cases of rents arising upon grants in fee. *Ct. of Appeals*, 1868, *Hosford v. Ballard*, 39 *N. Y.*, 147.
3. In an action against assignees who are not partners, to recover possession of specific personal property, the demand must be made upon each in order to maintain a joint action. [4 Hill, 13.] *Ct. of Appeals*, 1864, *Jessop v. Miller*, 1 *Keyes*, 321.
4. Demand on director of a railroad company. *Dunham v. Troy Union R. R. Co.*, 3 *Keyes*, 543.

DESCENT.

1. The statutes enabling certain aliens to hold lands apply to descents from those only who are resident *aliens* at the time of their death; and therefore they confer the right of dower on the *alien* widow of an *alien* purchaser, and deny it to the *alien* widow of the *native* born and *naturalized* citizen. They authorize resident aliens to transmit lands to alien heirs, but do not authorize citizens to do so. *Buffalo Superior Ct.*, 1866, *Larreau v. Davignon*, *Ante*, 367.
2. L., being a resident alien, purchased and took a conveyance of certain lands, and died in the possession of them. After the purchase, he became a citizen by naturalization. At the time of his death, he had an *alien* sister living, who had two children born in and citizens of this State. He had also a second cousin who was a naturalized citizen. All the ancestors of the second cousin, through whom said second cousin traced consanguinity to L., had died before L.—*Held*, that the second cousin inherited L.'s lands; that the children of L.'s sister could not inherit, by reason of the alienism of their mother. *Ib.*
3. The statute of 1845 authorized resident aliens to transmit lands to alien heirs, and did not authorize citizens to do so; and L. was not a "deceased alien," but a deceased citizen. *Ib.*

DEPOSITIONS.

- A feigned issue from the court of chancery, brought to trial on the order of that court, without a formal record, though not technically a suit, is to be deemed a suit within the meaning of 2 Rev. Stat., 391, § 1,—which per-

DISCOVERY AND INSPECTION.

mits the deposition of an absent witness, taken *de bene esse*, to be received in evidence. *Supreme Ct. Circuit*, 1845, *Ingalls v. Brooks*, 1 *Edm.*, 104.

EVIDENCE; TRIAL.

DISCHARGE.

1. Money put into the hands of an agent for a specific purpose of investment in regard to which he was to exert himself to execute the depositor's intention, constitutes a special trust; and if he appropriates it to his own use, it is a debt in a fiduciary capacity, incurred by violation of good faith, and is not discharged by a certificate in bankruptcy. [2 *How.*, 270.] *Supreme Ct. Circuit*, 1846, *Flagg v. Ely*, 1 *Edm.*, 206.
2. Under 1 Revised Statutes, 460, § 33, a discharge granted to an insolvent debtor, applying in conjunction with two-thirds of his creditors, operates to release him from a debt contracted *after* his petition is presented, and before an assignment is ordered. *Supreme Ct. Chambers*, 1845, 1 *Edm.*, 188.
3. A discharge under a foreign bankruptcy law is not a bar to an action here by plaintiffs who were not subjects of the foreign country, if it does not appear that they ever voluntarily became parties to the bankruptcy proceedings, or received any dividends thereunder. *Ct. of Appeals*, 1866, *Monroe v. Guillaume*, 3 *Keyes*, 30.

DISCONTINUANCE.

A plaintiff not suing *en autre droit*, cannot be permitted to discontinue without costs, whether the action be one at law, or in equity. *N. Y. Superior Ct.*, 1867, *Pennell v. Wilson*, 5 *Rob.*, 661.

DISMISSAL OF COMPLAINT.

DISCOVERY AND INSPECTION.

1. On an application for an order to compel the production of books, papers and documents, enough must be stated to justify the presumption that entries relating to a specified subject-matter, and tending to prove some claim or defense, exist. The documents required should be specifically stated, in order that the court may judge whether they are evidence. The mere affidavit of the party or his counsel, to that effect, is not sufficient. [1 *Duer*, 652; 3 *E. D. Smith*, 539; 18 *How.*, 519.] *N. Y. Superior Ct. Sp. T.*, 1866, *Speyers v. Torstritch*, 5 *Rob.*, 606.
2. The affidavit of a party from whom discovery is sought, that the books contain no entries relative to the matters in controversy, is not an answer to the application. *Supreme Ct. Chambers*, 1845, *Elba v. Bogardus*, 1 *Edm.*, 110.
3. When a book contains entries unconnected with the subject in litigation,

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and which are of a private character, inspection will be ordered of so much, only, as relates to the matter in suit. *Id.*

BILL OF PARTICULARS.

DISMISSAL OF COMPLAINT.

1. Delays in bringing on the trial of issues, caused by frequent promises of the defendant to settle, are not a good ground for dismissing the complaint for want of prosecution. *N. Y. Superior Ct. Sp. T.*, 1866, *Doyle v. O'Farrell*, 5 *Rob.*, 640.
2. The provisions of the Revised Statutes, restraining a court of equity from permitting a bill to be dismissed without costs, are not repealed by section 306 of the Code, declaring that, at all stages of the action, costs may be allowed or not, in the discretion of the court. The Code has not changed the former rules bearing on this subject. *N. Y. Superior Ct.* 1867, *Pennell v. Wylie*, 5 *Rob.*, 661.

DISCONTINUANCE.

EJECTMENT.

1. Ejectment may be maintained for a room in a building, although the walls have been taken down, and in form, character and value, the identity of the premises has been entirely destroyed. *Ct. of Appeals*, 1866, *Rowan v. Kelsey*, 2 *Keyes*, 594.
2. In such an action, evidence tending to show that the plaintiff had assented to the destruction of the building, so that he should be estopped from maintaining the action, is admissible. *Id.*
3. When the right of re-entry is not dependent upon a deficiency of sufficient goods and chattels whereon to make distress, no notice of an intention to re-enter need be given, under the act of 1846. The commencement of an action of ejectment stands instead of a demand of rent in arrear, and of a re-entry on the demised premises. *Supreme Ct.*, 1863, *Cruger v. McClaghry*, 51 *Barb.*, 642.

EQUITY.

Where a law authorizing a sale for assessments,—*e. g.*, the charter of the city of Buffalo,—makes a certificate of sale presumptive evidence of a legal assessment and a valid sale,—a certificate granted upon an assessment which was improperly or irregularly made constitutes a cloud upon the title, to remove which a suit in equity may be maintained. [14 *N. Y.* (4 *Kern.*), 9; 16 *Id.*, 519.] *Ct. of Appeals*, 1868, *Allen v. City of Buffalo*, 39 *N. Y.*, 386.

CAUSE OF ACTION; CREDITORS' ACTION; INJUNCTION; TRADEMARKS.

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ERROR.

1. It is no ground of complaint that a judge omits to pass upon a question of law which was not submitted to him, or to instruct the jury upon a point concerning which no request for instruction was made. *Ct. of Appeals*, 1867, *Atlantic Dock Co. v. City of Brooklyn*, 3 *Keyes*, 444.
2. *It seems*, that where the supreme court have reviewed an indictment and proceedings thereon by *certiorari* before judgment, they may properly, upon a writ of error, after judgment, merely examine the judgment. *Ct. of Appeals*, 1868, *Osgood v. People*, 39 *N. Y.*, 449, 454.
3. Under 2 Rev. Stat., 597, § 30,—which declares that in civil cases a writ of error shall not stay proceedings, unless an order to that effect be made and served,—the mere issue of a writ of error does not supersede a mandamus. *Supreme Ct. Sp. T.*, 1848, *People ex rel. Griffin v. Steele*, 1 *Edm.*, 505, 564.

ESCAPE.

If a person admitted to liberties of the jail limits is without such limits by virtue of a valid legal process, which affords justification to the officer taking him thence, it is not to be deemed an escape within the meaning of 2 Rev. Stat., 437, § 63, although that section contains no express exception to the rule that being without the boundaries is an escape. To constitute an escape there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy. [Allen on Sheriffs, 231; 4 Mass., 361; 10 Id., 206.] The act of the law, as well as the act of God, or of the public enemies, will excuse the sheriff in an action for escape. *Ct. of Appeals*, 1864, *Wilckens v. Willett*, 1 *Keyes*, 521; affirming S. C., *sub nom. Wickelhausen v. Willett*, 12 *Abb. Pr.*, 319; 21 *How. Pr.*, 40.

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I. Presumptions, and Burden of Proof.

1. In an action by the receiver of an insurance company upon a premium note assessed for payment of losses,—*Held*, that the report of a referee to whom it had been referred to take an account of the debts, &c., of the company was sufficient *prima facie* evidence of the losses which entitled the receiver to make an assessment to the whole amount of the note. *Ct. of Appeals*, 1865, *Sands v. Shoemaker*, 2 *Keyes*, 268.
2. Where a bond is delivered up, by one of two joint obligees to be canceled, the assent of his co-obligee will be presumed, if he makes no objection, and takes no steps in a contrary direction till after the lapse of several years. Besides, the act of his joint obligee is binding upon him, and

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- his assent need not be shown. *Supreme Ct.*, 1868, *Beach v. Endress*, 51 *Barb.*, 570.
3. In an action against a warehouseman for the loss of goods intrusted to him, it does not devolve on the plaintiff to prove the negative of the want of diligence on the defendant's part. The mere non-production of the thing bailed is *prima facie* evidence of want of care; and plaintiffs are not driven to a special action on the case, but trover will lie. [Reviewing authorities.] *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
 4. The burden of proving actual fraud in a conveyance by a debtor always rests upon the assailing creditor. *N. Y. Superior Ct.*, 1867, *Loeschigk v. Hatfield*, 5 *Rob.*, 26.
 5. When it is once found or established that a party has title, he who relies upon a disseizin must prove it. *Ct. of Appeals*, 1868, *Stevens v. Hauser*, 39 *N. Y.*, 302.

EXECUTION, 2.

II. Admissions and Declarations.

1. The admission of distinct facts during negotiation for a settlement is always competent evidence against the party making them. *Ct. of Appeals*, 1864, *Bartlett v. Tarbox*, 1 *Keyes*, 495.
2. Conversations and declarations of the testator, in favor of the executor, in actions between him and third persons, are not generally allowable. *Supreme Ct.*, 1868, *Chase v. Ewing*, 51 *Barb.*, 597.
3. In an action against a city railroad company to recover damages for a personal injury, occasioned by the improper conduct of the driver of the defendants' car, any expression of such driver, either before, during, or immediately after, and in the heat of the occurrence, showing his then design to do an injury, and not being a declaration predicated upon an afterthought, is admissible in evidence. *N. Y. Superior Ct.*, 1867, *Whittaker v. Eighth Ave. R. R. Co.*, 5 *Rob.*, 650.
4. Admissibility of evidence of threats and malicious conduct by the accused just before a murder. *Friery v. People*, 2 *Keyes*, 424.
5. Dying declarations not entitled to more weight as evidence than personal testimony would be, and to be subjected to tests of credibility arising from the circumstances of the case. *People v. Knapp*, 1 *Edm.*, 177.
6. A declaration made in the presence of one unconscious from sleep or stupor is not evidence. To be admissible, it must not only be made in his bodily presence, but also within his hearing and understanding. *Ct. of Appeals*, 1867, *Lannergan v. People*, *Ante*, 113.

III. Opinions of Witnesses.

1. In an action for damages caused by overflowing the land of the plaintiff, it is competent to ask a surveyor who had made a survey and map of the ground, how much more land would be overflowed at a given height of water. It is also competent to ask the plaintiff how long the water

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- would usually be in going off. *Ct. of Appeals*, 1867, *Phillips v. Terry*, *Ante*, 327.
2. To ascertain the value of a growing crop, damaged by the overflow of water, it is competent to ask a witness, conversant with the growth of such crops, how much, in his opinion, a given field would yield per acre. *Ib.*
 3. A mere objection to such a question, on the ground that it calls for the opinion of the witness, does not avail to sustain an objection on the ground that the witness was not competent as an expert. *Ib.*
 4. The testimony of neither of two witnesses as to the value of a denomination of foreign money, at a certain time, in United States currency, is admissible as that of experts, where one testified he was absent in Europe at that time, and based his calculations upon the value of gold as reported in newspapers which he read there; and the other, though a broker at the time of trial, was a soldier in the army at the time specified, and could not state any means of knowledge of such value. *N. Y. Superior Ct.*, 1867, *Schmidt v. Herfurth*, 5 *Rob.*, 124.
 5. In seeking to avoid the sale of property on account of fraud, the fact that the seller would not have made the sale except for the representations, may be shown, not merely by facts and circumstances, but also by the direct testimony of the seller. Where he is so situated as to be a competent witness, this is not a matter of opinion, but the statement of fact within his personal knowledge. *Ct. of Appeals*, 1864, *King v. Fitch*, 1 *Keyes*, 432.

IV. Documentary Evidence.

1. The rule that the testimony given on a former trial, by a witness since deceased, is admissible in evidence, is applicable to the testimony given by a party to the action. *Ct. of Appeals*, 1867, *Emerson v. Bleakley*, *Ante*, 350.
2. The statute authorizing parties to testify in their own behalf, has not deprived them of the right to introduce their books of accounts in evidence. [30 *Barb.*, 42.] *Ct. of Appeals*, 1866, *Stroud v. Tilton*, 3 *Keyes*, 139.
3. On a question of the admissibility of books of account, it is no objection that the witnesses who proved the correctness of the books, settled their accounts by the ledger, without examination of the original entries. *Ib.*
4. In an action in which the question is whether a certain transaction was a sale of property, or a delivery to the defendant as agent of the plaintiff, it is competent to prove an entry made by the plaintiff, in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness. *Ct. of Appeals*, 1867, *Tanner v. Parshall*, *Ante*, 373.
5. A letter from A. to B. & Co., and an indorsement thereon by B., relating in direct terms to the letter, bearing the same date, and purporting to be a material and substantial portion of it,—*Held*, to constitute together a con-

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- tract (the indorsement being carried into the evidence by the introduction of the letter), and that the terms of it could not be contradicted or varied by parol proof. *Ct. of Appeals*, 1867, *Mallory v. Tioga R. R. Co.*, *Ante*, 420.
6. The act of 1833, ch. 271, § 8,—which makes a notary's certificate evidence of a presentment,—does not make it evidence of an excuse for not presenting,—*e. g.*, that on due inquiry he had been unable to find the maker. *Supreme Ct. Circuit*, 1847, *Furniss v. Holland*, 1 *Edm.*, 470.
 7. In proving the existence of a judgment rendered by a justice of the peace, it is not competent to prove by parol, the entry of a judgment not upon the minutes of the justice, nor upon his docket. *Supreme Ct.*, 1863, *Stephens v. Santee*, 51 *Barb.*, 532.
 8. A memorandum made by a witness is not admissible as evidence of facts stated therein, without proof that the witness who made it has no recollection of the matters stated, independent of the written paper. Such a memorandum is not admissible for the purpose of corroborating the statements by witness of his recollection. *Supreme Ct.*, 1868, *Meacham v. Pell*, 51 *Barb.*, 65. But compare *Townsend Manufacturing Co. v. Foster*, 51 *Barb.*, 346.
 9. Where letters were produced and identified by a witness, and although he had forgotten the facts therein stated, he was able to say, in substance, that the contents of the letters were undoubtedly true at the time they were written, although he was then unable to remember them;—*Held*, that they were admissible as auxiliary to the testimony of the witness, and as memoranda made by him of a then existing state of facts. [15 *N. Y.*, 485; 17 *Id.*, 136; 22 *Id.*, 462.] *Ct. of Appeals*, 1864, *Crichton v. People*, 1 *Keyes*, 341.
 10. After a witness has stated generally that a letter inquired for was lost, parol evidence may be given of it, although he has not stated that it had been destroyed, nor where he had searched for it. *Supreme Ct.*, 1868, *Voorhees v. Dorr*, 51 *Barb.*, 580. *S. P.*, *Ct. of Appeals*, 1866, *Bronson v. Tuthill*, 3 *Keyes*, 32.

FORMER ADJUDICATION.

V. Rules relative to particular Facts and Issues.

1. An advancement may be established by parol. *Ct. of Appeals*, 1867, *Parker v. McCluer*, *Ante*, 97.
2. In a case of adultery, proof of improper familiarities, not amounting to criminality, was received to characterize the conduct of the party charged; and such proof was allowed of facts which occurred before the time in which the offense was alleged to have been committed. *Supreme Ct. Circuit*, 1845, *Lockyer v. Lockyer*, 1 *Edm.*, 107.
3. General evidence of good character for virtue not admissible in answer to a charge of adultery. *Supreme Ct. Circuit*, 1845, *Lockyer v. Lockyer*, 1 *Edm.*, 107.

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4. Where the evidence of adultery, in an action for a divorce, rests on the unsupported testimony of the defendant's paramour, the case will be referred back to the referee for further evidence; the testimony of the paramour being subject to the same objection as that of any other accomplice. [2 Bish. on M. & D., 8, § 644.] *N. Y. Superior Ct. Sp. T.*, 1866, Anonymous, 5 *Rob.*, 611.
5. An arrest of a person within this State by a private individual, without warrant, or by an officer of a foreign State without authority here, made for the purpose of forcibly abducting the arrested person from the State, and followed immediately by such abduction, cannot be justified. It would constitute a criminal offense at common law (1 Russ. on Crimes, 716), and by statute (2 Rev. Stat., 664, § 28). And in an action for damages by false imprisonment in such case, it is proper to exclude evidence that a felony had been committed in another State, and that the defendant had reasonable cause to suspect that it was committed by the plaintiff, there being no evidence of any requisition made or intended to be made for the offender's extradition. *Supreme Ct.*, 1865, *Mandeville v. Guernsey*, 51 *Barb.*, 99.
6. In an action for breach of promise of marriage, declarations of the defendant that he would make a good home for the plaintiff, made at the time, and as part of his conversations with the plaintiff which are relied on as establishing the promise of marriage, are admissible, in connection with the other conversation, as tending to prove the contract. *Ct. of Appeals*, 1867, *Button v. McCauley*, *Ante*, 29.
7. Under a general denial, in such an action, evidence that the plaintiff drank intoxicating liquors to excess, and sometimes got intoxicated, although not competent as a defense to the action, is competent and admissible in mitigation of damages. Any misconduct showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation. *Id.*
8. Under the general issue, in such an action, the plaintiff, in offering evidence which is competent in mitigation of damages, is not bound to specify that he offers it for that purpose. If the evidence is competent for any purpose, and is rejected, it is error, although not competent for other purposes in the action. *Id.*
9. If the intoxication of the plaintiff was connived at by the defendant, the burden of proof is upon the plaintiff to show such connivance. *Id.*
10. Upon the question of the practical location of a boundary line, it is competent to ask a witness whose residence and relation to the parties is such, that if there had been any difference between the adjoining proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. *Ct. of Appeals*, 1867, *Ratliffe v. Gray*, 3 *Keyes*, 510.
11. Testimony of a surveyor tending to show the ambiguity of the terms of

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- a deed in respect to location, and that all the lines as given in the deed are shorter than as found by actual survey, is competent. *Ib.*
12. Of the proper evidence and charge in an action to vacate the charter of a turnpike company for defects in their road. *People v. Waterford, &c. Co.*, 2 *Keyes*, 327.
 13. Upon an issue as to whether defendants agreed to store, insure, and sell goods for five per cent., evidence that the brokers' rates for merely selling were from five to seven per cent., without including storage or insurance, is irrelevant. *Supreme Ct.*, 1868, *Townsend Manufacturing Co. v. Foster*, 51 *Barb.*, 346.
 14. Where certain incidents of a contract are to be affected or modified by the event of failure of title to the premises to which the subject-matter of the contract relates, a subsequent judgment, tending to establish the fact of such failure of title, even though it does not conclusively establish it, is competent evidence upon the point. *Ct. of Appeals*, 1865, *Farnham v. Hotchkiss*, 2 *Keyes*, 9.
 15. What evidence is, and what is not, admissible, in an action to recover value of building stone, delivered under a special contract to deliver within a specified time. *Thomas v. Hunt*, 3 *Keyes*, 590.
 16. Negative evidence is insufficient to overcome presumption of fraud in a partnership assignment preferring individual creditors. *Ct. of Appeals*, 1865, *Harlbert v. Dean*, 2 *Keyes*, 97.
 17. In an insurance case, the omission to furnish the insurers with any documentary evidence touching the nature and extent of the loss, will not defeat the action unless it appear or be presumed that there is such evidence within the possession of the insured; and demand must be made in due season in order to render the objection available on the trial. *Supreme Ct. Circuit*, 1846, *Foster v. Jackson Marine Ins. Co.*, 1 *Edm.*, 290.
 18. On the trial of an indictment for murder, although the question whether the deceased had or had not money in his possession at the time of his death, is material, and evidence that money had been paid him shortly before that time may be proper, a declaration, made by him some weeks before the killing, that he had no money, is not admissible. *Ct. of Appeals*, 1868, *Kennedy v. People*, *Ante*, 147.
 19. In connection with other testimony, evidence that the prisoner, at about the time of the killing, proposed to purchase land is, in its nature, competent, and may be admissible as slight evidence that the prisoner had a motive to the crime in the want of money. *Ib.*
 20. Although medical witnesses are competent to speak, as experts, of the power of resistance of the skull, and so of the force requisite to break it, their opinions as to the position of the body when struck, inferred from the nature of the wound, are not admissible. This is not a matter lying peculiarly within the skill and experience of such witnesses. *Ib.*
 21. The official character of the officers of a municipal corporation may be

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- proved by showing them to be officers *de facto*. *Ct. of Appeals*, 1866, *Woolsey v. Trustees of Rondout*, 2 *Keyes*, 603.
22. Mere proof of an agreement between the surviving members of a prior firm, and his deceased partner therein, that upon the latter's death a third person should become a partner in the concern, but that no new partnership agreement was entered into with such third person, and the capital and everything belonging to the old firm remained the same, is not conclusive evidence of such supposed partnership, so as to render them liable as partners to each other or to third persons. *N. Y. Superior Ct.*, 1867, *Brink v. New Amsterdam Fire Ins. Co.*, 5 *Rob.*, 104.
23. Where a building is erected upon the land of one person by another person, without any authority or agreement in respect thereto, it becomes a part of the realty, and passes with a conveyance of the land; and to take the case out of this principle, on the ground that the building was erected by a tenant for purposes of trade and business, it is not enough to show that it was occupied for the purposes of business, but the existence of the relation of tenant must be made out by express proof or clear implication, and it must also be shown that the building was erected by the tenant for the purposes of trade or business, and that he exercised his right of removal during the term. *Ct. of Appeals*, 1866, *Ritchmyer v. Morss*, *Ante*, 44.
24. In an action in which the question is whether a certain transaction was a sale of property, or a delivery to defendant as agent of the plaintiff, the jury cannot consider the actual value or the unsoundness of the property, as a circumstance in connection with the price, bearing upon the question. *Ct. of Appeals*, 1867, *Tanner v. Parshall*, *Ante*, 373.
25. As to what is sufficient evidence to go to the jury, of the ignorance of the plaintiff of the nature of a general release under seal, set up in the answer, and of her belief that she was merely signing a receipt for a specified sum, upon a return *pro tanto* of a loan she had made; and what evidence will be sufficient to warrant a verdict of the jury in opposition to the terms of such an instrument,—see *Schmidt v. Herfurth*, 5 *Rob.*, 124.
26. Where, in the course of a negotiation by the plaintiff for the purchase of a horse from the defendant, the plaintiff had no means of detecting an existing defect in the animal upon mere inspection, without a thorough testing and trial of its qualities, but offered to give a certain price, *on condition that the horse was sound*, and the defendant unqualifiedly declared him to be sound, and received the price thus offered;—*Held*, that this was sufficient to establish a warranty, or at least to have gone to the jury as evidence of one. *N. Y. Superior Ct.*, 1867, *Quintard v. Newton*, 5 *Rob.*, 72.
27. The rule that no evidence is admissible which does not tend to prove or disprove the issue joined, excludes all evidence of collateral facts, or those which are incapable of affecting any reasonable presumption or inference as to the principal fact or matter in dispute. *Supreme Ct.*, 1868, *Townsend Manufacturing Co. v. Foster*, 51 *Barb.*, 346.

EXCEPTIONS.

EXAMINATION OF PARTIES.

1. A party to an action cannot be compelled by the adverse party to make an affidavit for the purpose of a motion, under subdivision 7 of section 401 of the Code of Procedure, as amended in 1862. *N. Y. Com. Pleas, Sp. T.*, 1868, *Hodgkin v. Atlantic & Pacific R. R. Co.*, *Ante*, 73.
2. The case of *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb. Pr. N. S.*, 430,—disapproved on this point. *Ib.*

EXCEPTIONS.

1. On the trial of an indictment for selling spirituous liquors of various kinds, a motion to require the district-attorney to elect as to the kind of liquor sold on which he would rest his case, and to require him to furnish the names of witnesses, rests in the discretion of the court, and its determination affords no basis for an exception. *Ct. of Appeals*, 1868, *Osgood v. People*, 39 *N. Y.*, 449.
2. An objection to testimony in response to a particular question, that it was irrelevant and incompetent, must be so phrased as to point to the specific answer and not to the whole testimony. Where the exception followed the last answer given by the witness, and merely stated that "this evidence" was objected to on such ground,—*Held*, that as some portions of the witness's evidence were unobjectionable, the objection was too broad, and was unavailable. *Ct. of Appeals*, 1867, *Wilson v. New York Central R. R. Co.*, 3 *Keyes*, 381.
3. When the general tenor of the judge's charge is correct, an exception to a single word which does not bear upon the issue cannot be entertained. *Supreme Ct.*, 1868, *Raynor v. Timerson*, 51 *Barb.*, 517.
4. Where there is no specific request to a judge to leave any particular question of fact to a jury, and he gives a general direction to find a verdict for either party, to which only a general exception is taken, the only two questions upon a review of his decision upon the exceptions are, whether the uncontroverted facts called for a decision in favor of the party against whom such verdict was directed? and, ought the verdict to be set aside as against evidence? [24 *How. Pr.*, 336; 18 *N. Y.*, 565; 31 *Id.*, 33.] And it seems, that in considering these questions, the party against whom the verdict is given is entitled to the benefit of a construction of the evidence most favorable to him; and evidence conflicting with what is in his favor may be disregarded. *N. Y. Superior Ct.*, 1866, *Bunge v. Koop*, 5 *Rob.*, 1.
5. The judge's comments upon the facts, or expression of opinion with regard thereto, are not necessarily subjects of exception. *Ct. of Appeals*, 1866, *Van Vechten v. Griffiths*, 1 *Keyes*, 104.
6. The judge's comments on the testimony, if not involving error in law, are not ground of exception, though they might afford ground for mov-

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ing for new trial on the case. *Supreme Ct. Circuit*, 1846, *Foster v. Jackson Marine Ins. Co.*, 1 *Edm.*, 290.

7. Where the decision in an action of a legal nature in which an equitable defense was interposed consists of a single conclusion of law from an undisputed state of facts, a general exception is available. *Supreme Ct.*, 1868, *Cythe v. La Fontain*, 51 *Barb.*, 186.
8. In order to sustain an exception to a referee's refusal to find as requested, the party who takes it must state, and bring before the referee, the proposition of law or fact which he desires to have the referee pass upon. *Ct. of Appeals*, 1866, *Brooks v. Van Every*, 3 *Keyes*, 27.

APPEAL; COURT OF APPEALS.

EXECUTION.

1. The direction to levy an execution upon a particular piece of property, is an incident to the obtaining payment of the debt by legal process; and when one of two partners gives such direction when acting in that business, the presumption is that he had the countenance and assent of the other partner. *Ct. of Appeals*, 1864, *Chambers v. Clearwater*, 1 *Keyes*, 310.
2. Upon a review of the authorities it appears that, in order to constitute a valid levy, either against the debtor or against any persons claiming title through him to the property:
 - First. The property must be in the view and under the control of the officer;
 - Second. The officer must take possession of the property either by removing it, or by an oral declaration that a levy is intended, and that the officer claims to hold the goods under such levy;
 - Third. An inventory, or at least a memorandum of the levy, should be made at the time.
 - Fourth. Leaving the goods in the possession of the debtor, until the sale, is at the risk of the officer, but does not invalidate the levy. *Ct. of Appeals*, 1864, *Bond v. Willett*, 1 *Keyes*, 377.
3. The sheriff, with execution in his hands, went to the person having charge of the property, or who, with others, was in its apparent possession, and, in view and control of the goods, informed him that he levied on the goods, and indorsed a memorandum of the levy upon the executions.—*Held*, that this was sufficient as a levy, although the person in charge was the assignor, who disclaimed any interest in the goods, and no notice was given by the sheriff to the assignee. *Ct. of Appeals*, 1867, *Elias v. Farly*, *Ante*, 39.
4. A sheriff went into the store where the property was, looked at it sufficiently to ascertain the character of the goods before him, informed the debtor that he had an execution against him, and when the debtor remonstrated as to the regularity of the execution, he insisted on the necessity of his making a levy. When the debtor still asked for time to see his

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counsel, the officer was willing to give him time to do so, but still insisted on the performance of his duty in making the levy; and in his presence took up a piece of paper and made an inventory of the articles levied on, which he placed within the execution, and indorsed upon the process the fact of having that day levied upon the stock of goods.—*Held*, that this was a sufficient levy, without any evidence that the specific goods which were in controversy in the action against the sheriff for making the levy, were in sight at the time of the levy. If they were not, it was for the party impeaching the levy to show it. *Ct. of Appeals*, 1864, *Bond v. Willet*, 1 *Keyes*, 377.

5. Where the deputy holding an execution against the property of a village after the time of an alleged levy, met a claimant of the property, who told him if he levied the property would be replevied, and he replied that there was no need of doing so, as he should do nothing more, unless he was indemnified,—*Held*, that this was not a sufficient levy. *Supreme Ct. Circuit*, 1846, *Minturn v. Stryker*, 1 *Edm.*, 356.
6. One who purchases at a wrongful sale on execution is estopped, when sued for taking the property, from setting up that he bid as agent merely. *Ct. of Appeals*, 1866, *Baltes v. Ripp*, 3 *Keyes*, 210.
7. Where a defendant is in close custody at the time of entering up judgment against him, but admitted to the jail liberties within three months thereafter, and is again surrendered into close custody by his bondsmen, he is not entitled to be discharged from custody upon the ground of the failure of the plaintiff to charge him in execution (2 Rev. Stat., 556, § 38), until three months after his surrender. *N. Y. Superior Ct. Sp. T.*, 1866, *Booth v. Barnes*, 5 *Rob.*, 640.

EXECUTORS AND ADMINISTRATORS.

An administrator with the will annexed appointed on the removal of executors may enforce a decree made on the accounting against such executors. *Ct. of Appeals*, 1864, *Clapp v. Meserole*, 1 *Keyes*, 281.

FORECLOSURE.

1. The purchaser, in good faith and for value, of a mortgage, should not have his rights prejudiced or postponed by a controversy between purchasers of the mortgaged premises, concerning the order in which different portions of the premises covered by the mortgage shall be sold under the foreclosure. He is entitled to judgment for foreclosure and sale, without reference to the conflicting claims of owners of the estate. *Ct. of Appeals*, 1866, *Smart v. Bement*, 3 *Keyes*, 241.
2. In a foreclosure suit, a subsequent party in interest, whether by way of mortgage, lease or judgment, cannot, on motion, obtain a right to redeem, and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem;

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- and in such an action the rights of all other parties can be protected. *Supreme Ct.*, 1868, *Douglass v. Woodworth*, 51 *Barb.*, 79.
3. *It seems*, that on foreclosure of a subsequent mortgage, a prior mortgage cannot be adjudged to be discharged, without consent of the prior mortgagee. *McReynolds v. Munns*, 2 *Keyes*, 215.
 4. Where, upon default in the payment of interest, upon a mortgage which provides that on such default the principal shall, at the mortgagee's option, become payable, the mortgagee has made his election by bringing an action claiming to foreclose for the whole amount, the defendant has a right, although after suit brought, to tender the whole amount, with costs, and the tender, if refused, extinguishes the lien of the mortgage. [1 *Rob.*, 246.] *Ct. of Appeals*, 1864, *Hartley v. Tatham*, 1 *Keyes*, 222.
 5. A notice of sale, on a statutory foreclosure, need not specify that the mortgage will be foreclosed. *Supreme Ct.*, 1868, *Leet v. McMaster*, 51 *Barb.*, 236.
 5. The statute (2 *Rev. Stat.*, 546, § 2, subd. 3) which requires the copy of the notice of sale in foreclosure proceedings, in order to bind persons having a subsequent lien, to be served on them either personally "by leaving the same at their dwelling-house," or by mailing it twenty-eight days before the time of sale, "properly folded and directed to such persons at their respective places of residence," does so in order to enable such notice to reach the parties interested; and affidavits of such service should state enough to show, by their mere inspection, and to enable the court to see and determine that the proper measures were taken to accomplish that end. Therefore, where the only evidence presented of the service of notice of sale on several persons by mail is afforded by an affidavit stating that on a day specified the affiant served "a copy on each of" the persons named "by depositing the same in the post-office of the city of New York, *properly folded and directed*, to each of" "such persons" "at their respective places of residence in the said city of New York," without specifying any place of residence, or mode of *folding or directing*, and that the affiant had put a "*proper postage stamp* on each of *said letters*," without otherwise mentioning its character, sufficient proof of service by mailing under the statute is not made out; and therefore the proceedings to foreclose the right of redemption of the owner of the premises cannot be regarded as effectual for that purpose. *N. Y. Superior Ct. Sp. T.*, 1866, *Chalmers v. Wright*, 5 *Rob.*, 713.
 7. It is not necessary to rely on the affidavits filed, in a statutory foreclosure of a mortgage, as proof of the regularity of the steps taken for such foreclosure; since it may be supplied *aliunde* by other evidence. *Ib.*
 8. Where the agent employed by the mortgagee to sell property under a statute foreclosure sold it at a time contrary to instructions given him, and for something less than its value,—*Held*, that the purchaser having bought in good faith without knowledge of the instructions, the court should not set aside the sale. An attorney acting in such transaction might be treated as acting in his professional character, except

FORMER ADJUDICATION.

where third persons are thus affected. *Supreme Ct.*, 1868, *Leet v. McMaster*, 51 *Barb.*, 236.

9. Circumstances tending to show fraud in reference to the adjournment of a sale previously notified, upon proceedings which had been subsequently abandoned, and the present proceedings commenced anew,—*Held*, not to amount to fraud in the sale. *Ib.*

FOREIGN CORPORATIONS.

The provisions of the Code of Procedure respecting actions against foreign corporations are not to be construed as extending the jurisdiction of the courts of this State over such corporations, except when proceeded against by attachment of their property, for the collection of debt or the redress of wrong. Our courts should not attempt to regulate the internal affairs of foreign corporations by enjoining, for instance, the issue of stock dividends, unless fraud be shown jeopardizing the property of stockholders who are citizens of this State. [30 *Barb.*, 159, 171.] Even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad, where it affects only the internal government of the corporation, where the judgment, if rendered, cannot be in any way enforced against them, except by injunction against individual members of the corporation, and the party has an ample remedy in the State where the corporation has a legal existence, the courts here may well decline exercising an equitable jurisdiction in the case. *Supreme Ct. Sp. T.*, 1868, *Howell v. Chicago, &c. Railway Co.*, 51 *Barb.*, 378.

FORMER ADJUDICATION.

1. A judgment in a former action is not a bar to a subsequent action, although the pleadings present the same matter, if it appear, either by the record, or, *it seems*, by extraneous evidence, that the matter in question was not litigated, and actual evidence was not given as to it, and it was not submitted to the court, but that the trial and verdict proceeded upon other grounds. *Supreme Ct.*, 1868, *Burwell v. Knight*, 51 *Barb.*, 267.
2. Where the record showed that the plaintiff in the subsequent action was defendant in the former, and pleaded there, by way of defense, the same matter which he now set up as a cause of action, but it appeared from the record that he did not appear on the trial in such action, and judgment was given upon the testimony of the plaintiff alone,—*Held*, that this sufficiently showed that such matter was not proved or submitted to the justice, and the judgment in the former action was no bar. *Ib.*
3. Where a court, in a former action between the same parties, had jurisdiction over the subject and the parties, and the questions of fact were the same as in the subsequent action, and were necessary to its decision, and either were or might have been litigated in that suit, and the final

- hearing was upon its merits, the judgment is *res adjudicata* as to all those things that were, or under the pleadings might have been, controverted in that action, whose adjudication was necessary to the final disposition of the case. *N. Y. Superior Ct.*, 1867, *Keene v. Clarke*, 5 *Rob.*, 38.
4. A judgment in a justice's court, for damages caused by the alleged diversion of a stream of water, is a bar to a subsequent action in the supreme court, involving the same issues. *Ct. of Appeals*, 1866, *Boyer v. Schofield*, 2 *Keyes*, 628.
 5. In an action against an infant for damages, a judgment of discontinuance in a former action for the same cause, brought in the court of a justice of the peace, the judgment being rendered on the ground that the defendant was an infant, and no guardian had been appointed, is not a bar. A justice has no jurisdiction to proceed against an infant-defendant, after the return of process, until a guardian has been appointed. *Supreme Ct.*, 1868, *Harvey v. Large*, 51 *Barb.*, 222.
 6. Although a mere judgment of nonsuit, or dismissal of complaint, does not bar a subsequent action for the same cause, even though the former action be of a legal nature, and tried by the court without a jury, yet a judgment dismissing the complaint on the ground that a material element of the cause of action was wanting,—*e. g.*, in the case of an action upon a recognizance, a judgment finding that the recognizance was never filed, and that filing was necessary to sustain an action thereon,—is a bar. Such a judgment shows that the merits of the controversy were litigated, submitted and decided. In order to justify a recovery in a subsequent action, it would be necessary to find that the conclusions of the former judgment were not true in point of fact, and this it is not competent to do so long as the former judgment remains in effect. *Supreme Ct.*, 1868, *People v. Smith*, 51 *Barb.*, 360.
 7. Where ejectment is brought against a tenant of a third person, and the tenant gives notice of the suit to the latter, and he thereupon assumes its defense, he is bound by a recovery therein; and an action for mesne profits may accordingly be brought against him; especially if he actually received such rents and profits. *Supreme Ct.*, 1868, *Van Alstine v. McCarty*, 51 *Barb.*, 326.
 8. Proceedings *in rem* against a vessel for supplies furnished her, determine no question of ownership of the vessel; and, consequently, are not admissible as evidence for the purpose of proving ownership. *Ct. of Appeals*, 1866, *Van Vechten v. Griffiths*, 1 *Keyes*, 104.
 9. Under the statutes relative to the State lunatic asylum, a certificate given by a county judge for the commitment of a person to the asylum as an insane pauper, is not conclusive evidence of the matters therein recited, as against a person who was not notified of the hearing and investigation. Hence, where a wife is committed by such a certificate, without notice to her husband, it is competent for the husband, when sued for her expenses, to prove that the county judge had no jurisdiction, and that the lunatic had not become insane within the provision of the statute.

FORMS

Supreme Ct., 1863, Supervisors of Monroe County *v.* Budlong, 51 *Barb.*, 493.

JUDGMENT.

FORMS.

1. Complaint on instrument for payment of money only,—*Held*, sufficient against makers, and insufficient against indorsers. *Conkling v. Gandall*, 1 *Keyes*, 228.
2. A complaint on negotiable paper payable to fictitious payee. *Mechanics' Bank v. Straiton*, *Ante*, 11.
3. Complaint in an action upon a covenant of guaranty by which the covenantor becomes surety for the punctual payment of the bond of other persons, and undertakes that, if default shall be made by them, he will pay and fully satisfy the mortgage mentioned in the bond. *Farnham v. Mallory*, *Ante*, 380.
4. Complaint in an action by the receiver of an insurance company, organized under the general law applicable to such companies, which, being insolvent, has distributed its capital among its stockholders. *Osgood v. Laytin*, *Ante*, 1.
5. Complaint for deceit or fraud by which plaintiff was induced to purchase. *Barber v. Morgan*, 51 *Barb.*, 116.
6. Complaint in an action for penalty for giving theatrical exhibitions without license, in violation of the act of 1839, ch. 13,—*Held*, sufficient on demurrer. *People v. Koll*, 3 *Keyes*, 236.
7. Confession of judgment,—*Held*, sufficient. *Acker v. Acker*, 1 *Keyes*, 291.
8. Mandamus to compel religious corporation to admit minister to pulpit. *People ex rel. Griffen v. Steele*, 1 *Edm.*, 505.
9. Mandate for the discharge of a criminal from an insane asylum on proof of recovery. *People v. Griffen*, 1 *Edm.*, 126.
10. Oath administered to jurors on a trial of issue of present insanity. *People v. Kleim*, 1 *Edm.*, 13.
11. Order quashing a return of mandamus, and allowing peremptory writ, to admit minister to pulpit, &c. *People ex rel. Griffen v. Steele*, 1 *Edm.*, 505.
12. Petition, consent, and order, for a substitution as plaintiff, of the successor in trust of a deceased plaintiff. *Emerson v. Bleakley*, *Ante*, 350.
13. Return to mandamus to compel religious corporation to admit minister to pulpit. *People ex rel. Griffen v. Steele*, 1 *Edm.*, 505.
14. Warrant in a criminal case,—*Held*, insufficient. *Abbott v. Booth*, 51 *Barb.*, 546.

HIGHWAYS.

FRAUD.

A silent partner who did not know, nor assume to know, as to the truth of a statement of the condition of the firm made by one of his copartners,—*Held*, not liable for fraud effected by such statement. *Ct. of Appeals*, 1866, *Chamberlin v. Prior*, 2 *Keyes*, 539.

FRAUDULENT CONVEYANCES.

1. In an action by a judgment creditor to set aside a fraudulent transfer of his debtor's property, if the property is subject to a mortgage, held by one who is not made a party, it is proper for the court, having set aside the fraudulent conveyance, to direct a receiver to sell the property, subject to the incumbrances. In an equitable proceeding no court orders a receiver to sell the thing, without giving a party claiming title to it a hearing. *Ct. of Appeals*, 1864, *Lane v. Lutz*, 1 *Keyes*, 203.
2. The statute of 1860 (ch. 438),—relative to assignments for benefit of creditors,—requires the schedule to be made by the assignor, as a necessary part of a valid assignment; and it is a prerequisite to vesting an absolute title to the property in the assignee. The title vested in the assignee prior to such schedule being made, is merely inchoate, and will be good if perfected by a compliance with sections 2 and 3 of the act, within the time limited,—but not otherwise. *Ct. of Appeals*, 1868, *Juliand v. Rathbone*, 39 *N. Y.*, 369; disapproving the decision below in 39 *Barb.*, 97.

HABEAS CORPUS.

On a controversy between parents for the custody of their child, if the child is old enough to have an intelligent choice, the court will consult that choice rather than any claims of the parents. *Recorder's Ct. of Hudson*, 1834, *Matter of Hansen*, 1 *Edm.*, 9.

HIGHWAYS.

1. It is no objection to the laying out of a highway that it terminates at one end in a road which has been used for more than twenty years as a highway but has not been recorded. Such a road becomes a highway by force of statute, and if it were not, it is now settled that a road may be laid out or dedicated to the use of the public as a highway, though at one end it may have no outlet. [24 *N. Y.*, 560; 11 *Barb.* 457; 14 *Eng. Law & Eq.*, 69.] *Ct. of Appeals*, 1866, *People v. Van Alstyne*, 3 *Keyes*, 35.
2. Under the act of 1847, the proper form of an appeal from the decision of highway commissioners is an appeal to the county judge. The Code of Procedure does not change the statutory form, so as to require it to be taken to the court. *Ct. of Appeals*, 1866, *People v. Van Alstyne*, 3 *Keyes*, 35.

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3. Upon appeal from the decision of highway commissioners to referees appointed by the county judge, if the proceedings anterior to the commissioners' order are regular upon their face, the referees cannot receive extrinsic evidence to impeach the freeholders' certificate of the necessity of the road. *Court of Appeals*, 1866, *People v. Van Alstyne*, 3 *Keyes*, 35.

INDICTMENT.

1. While an indictment remains in the court in which it is found, a caption is not necessary. *Ct. of Appeals*, 1866, *Wagner v. People*, 2 *Keyes*, 684.
2. When a person is known by two names, and the pleader, for greater certainty, deems it necessary to aver such fact in an indictment, it is immaterial which of the two names is first stated, and which was the real name. It is sufficient if the pleading designates the names by which the person intended may be known with certainty, irrespective of the priority of the names in the statement. *Ct. of Appeals*, 1868, *Kennedy v. People*, *Ante*, 147.
3. The use of the word "*alias*" instead of "*alias dictus*," or "otherwise called," constitutes no uncertainty in an indictment. *Id.*
4. A felony can be charged in different ways in an indictment, for the purpose of meeting the evidence, as it may come out upon the trial; and, if this is done in good faith, it is not error for the court to refuse to compel the prosecution to elect upon which count they will claim a conviction. *Ct. of Appeals*, 1867, *Lanergan v. People*, *Ante*, 113.
5. Under 2 Rev. Stat., 649, § 63, and Laws of 1862, ch. 374, § 2, an indictment for stealing money from the person need not aver that the property was stolen in the night time. *Ct. of Appeals*, 1865, *Fallon v. People*, 2 *Keyes*, 145.
6. Alleging several sales of spirituous liquors to divers persons unknown, is not a charge of more than one offense, nor too general. [17 Wend., 475.] *Ct. of Appeals*, 1868, *Osgood v. People*, 39 *N. Y.*, 449.
7. An indictment under the statute making it criminal for a person to advise or procure an abortion, is not bad for the reason that it states "that heretofore, to wit, at the time and place aforesaid, one A. was a pregnant woman, and that the accused, with the intent to produce miscarriage, did advise and procure of her *then and there to take* certain drugs," &c. The whole statement may be understood to relate to the same moment of time, and it sufficiently shows an advice and procurement at the time specified as the time of taking. *Ct. of Appeals*, 1864, *Crichton v. People*, 1 *Keyes*, 341.

INJUNCTION.

1. After an uncopyrighted drama has been, with the sanction of the author, represented upon the stage, without any restrictions or conditions imposed upon the spectators, the court will not, at the suit either of

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the author or of his assignee, enjoin from reproducing the same drama other persons who have obtained copies by seeing and hearing such representations. *N. Y. Superior Ct. Sp. T.*, 1868, *Palmer v. DeWitt*, *Ante*, 130.

- An injunction should not be granted to restrain directors of a corporation, which has earned a surplus, from issuing new stock in lieu of dividend, if they have power, by law, to increase their capital. Nor is a mere declaration of policy on the part of the board not to take such a course a ground for enjoining a subsequent board from so doing. *Supreme Ct. Sp. T.*, 1868, *Howell v. Chicago, &c. Railw. Co.*, 51 *Barb.*, 378.
3. It is no objection to the continuance of an injunction to restrain one company from uniting and consolidating with another company, that the latter company, or that the stockholders severally, are not made parties. *Supreme Ct. Sp. T.*, 1869, *Blatchford v. Ross*, *Ante*, 434.
 4. In an action in a State court to stay proceedings on a judgment, and to have it set aside, upon the ground of fraud, if one of the defendants be a consul, the temporary injunction must be dissolved as against him, because State courts have no jurisdiction of the person of such an officer. *N. Y. Com. Pleas, Sp. T.*, 1868, *Sippile v. Albites*, *Ante*, 76.
 5. The injunction may, however, be continued, in a proper case, as against other defendants. *Ib.*
 6. Where a lease contains a covenant on the part of the lessee not to underlet the premises, to any one whose business or signs are considered objectionable by the lessor, or without his written consent, and there has been a breach of this covenant, by the execution of a sub-lease to one who is about to conduct an objectionable business, an injunction order is only proper against the sub-lessee; and the lessors, for a remedy against original lessee, are confined to an action for damages; and where the latter is not proved to be connected with any of the acts of the sub-lessee complained of, the award of any but nominal damages against him is erroneous. *N. Y. Superior Ct.*, 1867, *Importers' & Traders' Ins. Co. v. Christie*, 5 *Rob.*, 169.
 7. An action does not lie by a tenant, although he shows a valid lease, to enjoin the landlord or persons claiming under a subsequent alleged lease, from attempting to recover possession by action, or summary proceedings before a magistrate. *N. Y. Superior Ct.*, 1866, *McGune v. Palmer*, 5 *Rob.*, 607.
 8. An injunction cannot issue to restrain the collection of a tax, although illegally imposed. *Ct. of Appeals*, 1867, *Hasbrook v. Kingston Board of Education*, *Ante*, 399.
 9. The rule that a manufacturer, or merchant for whom goods are manufactured, has a right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining, and that this right will be protected by injunction, applies to the use of such a compounded term as

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"Cocaine," to designate a hair-wash in which cocoa-nut oil is a principal ingredient. And the subsequent adoption, by a rival dealer, of the word "Cocaine," to designate a similar compound put up by him, is an infringement against which the courts will interpose by injunction. *Ct. of Appeals*, 1867, *Burnett v. Phalon*, *Ante*, 212.

INSANE PERSONS.

1. On the trial of an issue of present insanity, when interposed as an objection to the trial of an accused upon indictment, the jury must be satisfied that the prisoner's mind is in such a state of unsoundness or disease as to exempt him from responsibility; and not merely that it is so infirm as to render him incapable of managing his own affairs. *N. Y. Oyer & T.*, 1845, *People v. Kleim*, 1 *Edm.*, 13.
2. In an order to constitute insanity a defense to a criminal accusation, it must be proved that at the time of committing the act, the prisoner was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know he was doing what was wrong; and the question whether he knew the difference between right and wrong, is not to be put generally, but in reference to the very act with which he was charged. *Ib.*

INSURANCE.

1. An agent of an insurance company, vested with authority to receive applications and make them temporarily binding, pending the consideration of the risk, and to receive premiums on renewals, has not implied authority to give consent to an assignment of a policy. *Ct. of Appeals*, 1867, *Stringham v. St. Nicholas Ins. Co.*, *Ante*, 80.
2. Authority to give such consent is not to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made, although the person applying for the consent to the assignment may have supposed that such agent had authority to grant such consent. *Ib.*
3. The loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury. *Ct. of Appeals*, 1867, *Duncan v. Great Western Ins. Co.*, *Ante*, 173; *N. Y. Superior Ct.*, 1868, *Pardo v. Osgood*, 5 *Rob.*, 348; reversing *S. C.*, 2 *Abb. Pr. N. S.*, 365.
4. The mistake of naming one who has no interest, as the insured in a policy of fire insurance, is cured by an indorsement, made by the secretary with notice of such mistake, stipulating that the loss, if any, is to be pay-

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- able to a mortgagee named. *Ct. of Appeals*, 1867, *Solms v. Rutgers Fire Ins. Co.*, *Ante*, 201.
5. A recovery may be had in the name of the real party in interest in such a case, for the indorsement may be regarded as a new contract of insurance with him. *Ib.*
 6. Whether the owner of property insured can recover, if the policy was, by mistake, made payable in terms to another person,—*query?* *Ib.*
 7. A provision in a policy of fire insurance, exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy, as well as any external explosion. *Ct. of Appeals*, 1867, *Hayward v. Liverpool & London Fire & Life Ins. Co.*, *Ante*, 142.
 8. The exception of fire caused by explosion is not inconsistent with the fact that the engine itself was insured against fire. *Ib.*
 9. The rule that, in case of repugnancy between the written and the printed parts of the policy, the written shall prevail over the printed part, is not applicable in such a case. In such cases the inquiry always is, is there any repugnancy between the exception and the scope of the undertaking in the policy? If not, effect is to be given to both the written and printed parts according to the ordinary rules of construction. *Ib.* Compare *Dows v. Montgomery*, 5 *Rob.*, 445.
 10. Where an insurance company, organized under the general law applicable to such companies, being insolvent, distributes its capital among its stockholders, thus placing it beyond the reach of its creditors, it acts in fraud of its creditors, and such fund may be recovered back from those who received it, by a proper action commenced by the proper parties. *Ct. of Appeals*, 1867, *Osgood v. Laytin*, *Ante*, 1.
 10. Under the provisions of the act of 1854 (ch. 369, § 13),—which authorizes the directors of mutual insurance companies to adjust the claims for losses, and to “settle and determine the sums to be paid to the several members thereof as their respective portions of such losses, and to publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed;”—the publication, in the absence of by-laws, is to be made according to the discretion of the directors, but, where by-laws exist, their prescriptions must be followed. Where the by-laws prescribe the mode of publication, a defect therein is not aided by proof of a personal demand. *Ct. of Appeals*, 1865, *Sands v. Shoemaker*, 2 *Keyes*, 263.

JUDGMENT.

1. The fact that a plaintiff moves for a judgment, instead of moving to strike out a false answer, is no objection to granting the former, as the right to judgment follows the striking out of a false answer. *Supreme Ct. Sp. T.*, 1868, *Kreitz v. Frost*, *Ante*, 277.
2. It is a rule in chancery not affected by the Code, that a party must recover according to the case made by his complaint, or not at all; *secun-*

JUDGMENT.

dem allegata as well as *probata*. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleadings and evidence. [2 Comst., 506; 2 Id., 160; 6 Seld., 363; 4 Barb., 265; 20 Id., 473.] *Ct. of Appeals*, 1864, *Rome Exchange Bank v. Eames*, 1 *Keyes*, 588.

3. Where an action of an equitable nature is defeated by failure to establish the equity relied upon, and by showing that the demand in suit was brought by the plaintiff, who was an attorney, with intent to sue thereon, contrary to statute, it is proper that the judgment be in form a dismissal of the action and for costs, not a mere nonsuit. *Ct. of Appeals*, 1865, *Mann v. Fairchild*, 2 *Keyes*, 106.
4. In an action upon a covenant of guaranty by which the covenantor becomes surety for the punctual payment of the bond of other persons, and undertakes that if default shall be made by them, he will pay and fully satisfy the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiffs the amount due, but that he should pay and satisfy, or cause to be paid and satisfied of record, the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay to the plaintiffs the amount. *Ct. of Appeals*, 1867, *Farnham v. Malory*, *Ante*, 380.
5. Where, in an action against two defendants, as joint debtors, the summons is served on only one, who appears, no appearance being entered for the other, the judgment should be entered against both defendants, but directing the amount recovered to be made of the joint property of both, and the individual property of the person served. *N. Y. Superior Ct. Sp. T.*, 1866, *Northern Bank of Kentucky v. Wright*, 5 *Rob.*, 604.
6. To make a judgment an estoppel to proving certain facts in a subsequent case, it should be made to appear upon what grounds the prior judgment and verdict proceeded. *Ct. of Appeals*, 1864, *Colwell v. Bleakley*, 1 *Keyes*, 62.
7. A judgment is not conclusive, as *res adjudicata*, upon one who is neither a party nor privy. *Buffalo Superior Ct.*, 1867, *National Fire Insurance Co. v. McKay*, *Ante*, 445.
8. When one, by the nature of his covenant, is bound, upon the request of his covenantee, to defend an action against the covenantee, a notice to defend makes the judgment subsequently recovered against the covenantee, when interposed in an action by him upon the covenant, conclusive evidence, against the covenantor, of its breach; but it does not make the covenantor a party or privy to the judgment against the covenantee. *Id.*
9. The doctrine of extinguishment by judgment does not apply to the case of a judgment or decree for the payment of legacies, the failure to pay which arose from a breach of trust on the part of the assignors of those who claim the benefit of the judgment as an extinguishment. In such a

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case both judgment and satisfaction are required, to discharge the debt. *Ct. of Appeals*, 1864, *Clapp v. Meserole*, 1 *Keyes*, 281.

10. A judgment rendered by a justice of the peace, while holding over after his term of office had expired, but before that of his successor commenced, cannot be impeached collaterally. The office is continuing in its nature, and as he was in undisputed possession under apparent authority of law, his title can only be questioned in a proceeding directly involving that issue. *Ct. of Appeals*, 1867, *Read v. City of Buffalo*, 3 *Keyes*, 447.
11. Under the provision of the Code of Procedure, section 63,—that “a justice of the peace, on the demand of a party in whose favor he *shall have rendered a judgment*, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered, and from that time the judgment shall be a judgment of the county court,”—the docketing of a transcript is a nullity if no judgment was in fact rendered by the justice. The transcript is *prima facie* evidence, but the existence of the justice’s judgment is a jurisdictional question, and a party is at liberty to show that, although a transcript was thus docketed, there was no justice’s judgment actually entered in the docket of the justice, or in the minutes of his trial, to sustain it. *Supreme Ct.*, 1868, *Stephens v. Santee*, 51 *Barb.*, 532.
12. Only a party to the record, or a person having some legal or equitable interest in the cancelment of a judgment, is entitled to apply to the court in which it has been recovered, to vacate or order it satisfied of record, and such application must be founded on recognized legal or equitable grounds. A mere stranger, without any personal equity therefor, who does not show any personal injury to arise from its continuance, is not entitled to such relief. If such judgment be a lien upon the property of a third person, all parties interested in such judgment, or its continuance, must be brought before the court by action, or notice of the application, whether the object be to vacate the judgment, or relieve such property from its lien. *N. Y. Superior Ct.*, 1866, *Matter of Beers*, 5 *Rob.*, 643.
13. Where a judgment entered to stand as security has been assigned to third persons, who hold it as security, the plaintiff has an interest in the judgment, upon which he has a right to be heard, or at least notice and opportunity to be heard, before the court can satisfy it of record. *Ib.*
14. The act of 1863,—which authorizes the corporation counsel of the city of New York to move to vacate judgments against the city when obtained by collusion or fraud,—does not preclude such motion being made by counsel employed by the comptroller under direction of the common council, in case of the refusal of the corporation counsel to move. *Ct. of Appeals*, 1866, *Baldwin v. Mayor, &c. of New York*, 2 *Keyes*, 387.
15. Rules applicable to such a motion discussed. *Ib.*

ATTORNEY AND CLIENT, 7, 9; FORMER ADJUDICATION; JURISDICTION, 1;

JUDICIAL ACT.

PROHIBITION.

JUDICIAL SALE.

Where a plaintiff having obtained an order for the sale of chattels which are subject to a mortgage, makes an agreement with the mortgagee regulating the sale, and the sale is had on the faith thereof, he may be held estopped from afterward objecting to the mortgage on the ground that it was not filed, even though he was ignorant of the defect at the time of the agreement. *Ct. of Appeals*, 1864, *Lane v. Leutz*, 1 *Keyes*, 203.

EXECUTION, 6.

JURISDICTION.

1. A judgment, attempted to be rendered by a judge, who is disqualified by reason of consanguinity with one of the parties, is void in the most extreme sense known to the law, and, therefore, is utterly incapable of being made good by any omission, waiver or express consent. *Ct. of Appeals*, 1864, *Chambers v. Clearwater*, 1 *Keyes*, 310.
2. The act of the legislature ceding the Navy Yard at Brooklyn to the United States,—which provides that the cession “shall not prevent the operation of the laws of the State,” within the same,—has the effect to preserve the jurisdiction of the State over offenses committed on board a government vessel in the Navy Yard, and over the person of the offender. *Kings Oyer & T.*, 1845? *People v. Lane*, 1 *Edm.*, 116.
3. The boundary of territorial jurisdiction between the counties of New York and Kings, is the actual (and not the *original*) low water line on the Brooklyn side. *Ct. of Appeals*, 1867, *Atlantic Dock Co. v. City of Brooklyn*, 3 *Keyes*, 444.
4. Of the rules as to the jurisdiction of municipal corporations to make assessments for local improvements. *Ireland v. City of Rochester*, 51 *Barb.*, 414.

ARREST, 9; JUDGMENT, 10.

JURY.

Ownership of real estate not a qualification for jurors in the city of New York. [Laws of 1847, ch. 495.] *Ct. of Appeals*, 1866, *Friery v. People*, 2 *Keyes*, 424.

TRIAL.

JUSTICES' COURTS.

1. In an action relative to injuries to real property, if the title of neither party is disputed, evidence given concerning title does not oust the justice of jurisdiction. [6 *Hill*, 44, 271; 8 *Barb.*, 239; 11 *Id.*, 390.] *Ct. of Appeals*, 1866, *Boyer v. Schofield*, 2 *Keyes*, 628.
2. *It seems*, that where the defendant in an action in a justice's court proves

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- to be an infant, the justice **can** arrest the trial, appoint a guardian, and commence the trial *de novo*. *Harvey v. Large*, 51 *Barb.*, 222.
3. Merely entering the verdict in the docket, and putting down the items of costs **and** adding them up with the verdict, and thus entering the sum **total**, and nothing more, is not rendering a judgment on such verdict. Judgment must be rendered, and entered in some way as a judicial act. *Supreme Ct.*, 1863, *Stephens v. Santee*, 51 *Barb.*, 532.
 4. The omission by a justice to keep his docket in the manner which the law prescribes does not render a judgment given by him void; as the proceedings before him can still be proved by himself. *Supreme Ct.*, 1863, *Baker v. Brintrall*, *Ante*, 253.
 5. On appeal from a justice's judgment, the presumptions are in support of the judgment, and variance cannot be raised for the first time in the court of appeals—especially in a doubtful case. *Ct. of Appeals*, 1866, *Thompson v. Bennett*, 2 *Keyes*, 503.

JUDGMENT, 10, 11.

LEGACIES.

Where legacies have been bequeathed to several legatees, and the executor has committed a *devastavit*, the estate is to be considered the principal debtor, and is not to be discharged from such legacies except by payment; and any judgment against the executor for such legacy is to be deemed as collateral and auxiliary merely; not as affecting the principal debt. *Ct. of Appeals*, 1864, *Clapp v. Meserole*, 1 *Keyes*, 281.

LIEN.

MECHANIC'S LIEN.

LIMITATIONS OF ACTIONS.

1. Title 2 of the Code of Procedure does not extend to cases where the right of action had accrued when that title became a law, but leaves them to be governed by the law then in force. *Ct. of Appeals*, 1864, *Van Alen v. Feltz*, 1 *Keyes*, 332.
2. Where a sheriff, acting under numerous attachments against the same debtor, makes successive collections and sales, the fund so received may be regarded as single and entire, and the statute of limitations (Code, § 92),—requiring actions for non-payment of money collected by a sheriff to be commenced within three years after the cause of action accrues,—does not begin to run against one of the attaching creditors the moment the sheriff has collected enough to satisfy the first process. It may be regarded as the right and duty of the sheriff, in such cases, to retain the fund until the whole is collected, and conflicting claims of priority are determined. *Ct. of Appeals*, 1866, *Davy v. Field*, 2 *Keyes*, 608.
3. The statute of limitations is not to be regarded as barring an action to

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- recover possession of a letter addressed to a municipal corporation, until after notice to the corporation of the possession of the defendant, or the one under whom he claims. *Supreme Ct.*, 1868, *Mayor, &c. of N. Y. v. Lent*, 51 *Barb.*, 19.
4. If, in an action of an equitable nature, the plaintiff fails to make out an equitable cause of action, but establishes a cause of action at law, to which the statute of limitations applicable to legal actions is a defense, the action is barred; for a party must maintain his equitable action upon equitable grounds, or fail, even though he may prove a good cause of action at law on the trial. [14 N. Y. (4 Kern.), 540.] *Ct. of Appeals*, 1865, *Mann v. Fairchild*, 2 *Keyes*, 106.
 5. The rule that where there is a strict technical and continuing trust which is cognizable only in a court of equity, lapse of time is not a bar, does not apply to the case of a claim against executors for the payment of a legacy which was a vested right in the legatee from the beginning, subject only to being defeated by the widow exercising her right of election in lieu of dower, where she did not exercise it, but died before the probate of the will. In such a case, the legatee's claim is cognizable in a legal action, and the right of action is barred in six years after the expiration of a year from the granting of letters. *Supreme Ct.*, 1868, *American Bible Society v. Hebard*, 51 *Barb.*, 552.
 6. Although where there are successive owners of the cause of action for equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes of both; and when the statute period is elapsed, the demand is barred, though the last proprietor had recently acquired his right; yet, if the first legal proprietor of the claim is a trustee having no interest, the cause of action (in this case the right to foreclose a mortgage) may be regarded as vesting in the first instance in the *cestui que trust*, and if she were then under the disability of infancy, the statute does not begin to run as against her until majority. *Ct. of Appeals*, 1864, *Bucklin v. Bucklin*, 1 *Keyes*, 141.
 7. A judgment and sale, in an action to foreclose a mortgage, to which the owner of the lands is not a party, is a nullity. The owner of lands, which have been held adversely to him, under such a judgment and sale, for more than ten years, is not within the ten years limitation of section 52 of title 2 of chapter 4 of part 3 of the Revised Statutes. *Buffalo Superior Ct.*, 1867, *National Fire Ins. Co. v. McKay*, *Ante*, 445.
 8. A foreign corporation cannot avail themselves of the statute of limitations as a defense to an action in the courts of this State. *Ct. of Appeals*, 1867, *Mallory v. Tioga R. R. Co.*, *Ante*, 420.
 9. The time during which an injunction is in force is not to be excluded from the time fixed by the statute of limitations, unless the injunction was such as to restrain the plaintiff from bringing the action. *Ct. of Appeals*, 1867, *McQueen v. Babcock*, 3 *Keyes*, 428.
 10. The provision of the bankruptcy act of 1841 (5 U. S. Stat. at L., 466,

MECHANICS' LIEN.

§ 8),—limiting the assignee in bankruptcy to two years within which to bring actions,—has no application to a cause of action arising in his own favor for injury to property, or a disseizin of lands vested in him by the proceedings. *Ct. of Appeals*, 1868, *Stevens v. Hauser*, 39 N. Y., 302.

LITERARY PROPERTY.

The common law right of the author of an unpublished manuscript to its exclusive use, pertains only to the *unpublished* work; and after unrestricted publication to the world, neither the author, whether a foreign or a domestic writer, nor his assignee, can assert an exclusive right to property in its future use and publication. *N. Y. Superior Ct. Sp. T.*, 1868, *Palmer v. De Witt*, *Ante*, 130.

MANDAMUS.

1. The writ lies to the person or body whose legal duty it is to perform the required act; as where a corporation is required by law to do a particular act, the mandamus is addressed to that organ of the corporation which is to perform it. *Ct. of Appeals*, 1866, *People v. Common Council*, 3 *Keyes*, 81.
2. The neglect of taxing officers to raise money which they are required to raise for the benefit of public creditors, may amount, under peculiar circumstances, to a refusal to do so. [8 *Adol. & El.*, 889, 904; 20 N. Y., 253.] *Ct. of Appeals*, 1865, *People v. Board of Supervisors*, 2 *Keyes*, 288.
3. Where the trustees of a charitable asylum are authorized to direct the administration of the trust, and clothed with power to make necessary rules for its government, the action of the trustees or executive committee in investigating a charge against an inmate, of a violation of the rules made by them, and in expelling him therefor, is subject to review by the supreme court. *Supreme Ct. Sp. T.*, 1868, *People ex rel. Newman v. Sailors' Snug Harbor*, *Ante*, 119.

CAUSE OF ACTION, 10.

MARRIED WOMEN.

PARTIES, 11.

MEASURE OF DAMAGES.

DAMAGES.

MECHANICS' LIEN.

In mechanics' lien cases, under the statute relating to the county of Erie (Laws of 1844, ch. 305), the court acquires jurisdiction of the subject-matter by the personal service of the notice required by the statute upon the opposite party within the time required by law; and it is not necessary. N. S.—Vol. V.—34.

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sary that it should appear by the record that the incipient proceedings to create a lien were ever taken. And the judgment in such a proceeding may be personal, like a judgment in assumpsit. *Ct. of Appeals*, 1864, *Maltby v. Green*, 1 *Keyes*, 548.

METROPOLITAN POLICE.

Under section 28 of the rules of the police commissioners of the metropolitan district, a person, in order to be detained as a prisoner at the station house during a recess of the police court, must be charged with a felony or misdemeanor. If the charge was merely for violating a city ordinance against driving a horse upon the sidewalks, the officers, when sued for false imprisonment thereon, must show that the offense was a felony or misdemeanor in order to bring it within the rule. *Ct. of Appeals*, 1867, *Schneider v. McLane*, 3 *Keyes*, 568.

MISNOMER.

PARTIES, 3.

MISTAKE

The rule that a court of equity will reform a deed or writing, if by accident or mistake it does not express the real intention of the parties,—applied to the case of a mortgage misdescribing the note it was given to secure. *Ct. of Appeals*, 1866, *Prior v. Williams*, 3 *Keyes*, 231; S. C., more fully, 2 *Keyes*, 530.

MONEY HAD AND RECEIVED.

The proprietor of a gaming house with whom, or in whose presence, a clerk loses at play the money of his employer, is liable to the employer in an action for money had and received. In an order to maintain such an action it is not always necessary there should have been an express privity of contract between the plaintiff and the defendant. Where one receives the money of another, and has not the right conscientiously to retain it, a privity between the true owner and the receiver will be implied, as well as a promise to repay it. *Ct. of Appeals*, 1865, *Caussidiere v. Beers*, 2 *Keyes*, 198.

MUNICIPAL CORPORATIONS; PAYMENT, 2.

MORTGAGE.

1. An action lies by the receiver of the property of the grantor in a warranty deed, against the grantee in such deed, to prove that the deed, though absolute in its terms, was in fact a security in the nature of a mortgage. *Ct. of Appeals*, 1867, *Van Dusen v. Worrell*, *Ante*, 286.

MOTIONS AND ORDERS.

2. In such an action the plaintiff may recover the price for which the grantee has sold the land, deducting the amount due the grantee, and a reasonable compensation for his trouble in effecting a sale. *Ib.*
3. A mortgagor, without covenant or representation, is not estopped from showing what estate he had in the mortgaged lands at the time of the delivery of the mortgage. *Buffalo Superior Ct.*, 1867, *National Fire Ins. Co. v. McKay*, *Ante*, 445.

MOTIONS AND ORDERS.

1. The rule that the testimony of an accomplice, though to be received with caution, may, even when unsupported and uncorroborated, sustain a conviction,—applied in the case of weighing the evidence presented by affidavits for an order of arrest in a civil action. *N. Y. Com. Pleas Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, *Ante*, 54.
2. Want of service of the summons, in an action, is not a mere irregularity, but affects the jurisdiction, and is not affected by the statutory limitation of two years, against motions to set aside for irregularity. *N. Y. Superior Ct. Sp. T.*, 1866, *Weeks v. Merritt*, 5 *Rob.*, 610.
3. In an action to foreclose a mortgage, a subsequent party in interest, who has been misled by information received from counsel, cannot, on motion, after sale or delivery of the deed, have an order giving him the right to redeem. All that can be done on such motion is to open the judgment, and allow the moving parties to answer and obtain a resale, on terms indemnifying the purchaser; and this should not be granted if the purchaser elects to ratify and confirm the lease, under which the moving parties claim, for the remainder of the term. *Supreme Ct.*, 1868, *Douglass v. Woodworth*, 51 *Barb.*, 79.
4. A motion for a new trial on the ground of newly discovered evidence, is so far an enumerated motion as to entitle the successful party, upon its determination, to costs as on the argument of a case. *N. Y. Superior Ct.*, 1868, *Warren v. Western Transportation Co.*, 5 *Rob.*, 490.
5. Where an order, settled *ex-parte*, which set aside a referee's report, and denied a motion to vacate the order of arrest, also vacated a provision in the order of reference extending the time to answer until some time after the report should be confirmed, and the plaintiff perfected judgment immediately for want of an answer, and issued execution, the court, on motion, opened the judgment and let the defendant in to defend; on the ground that, had the vacating order been settled on notice to defendants, and the attention of the justice been called to all the provisions of the order of reference, he would not have vacated the extension of time to answer, but would have given the defendants a reasonable time to set up their defense. *N. Y. Superior Ct. Sp. T.*, 1866, *Swift v. Wylie*, 5 *Rob.*, 641.
6. There is no authority for one justice of this court to vacate an order made by another justice, except upon notice to the parties who have a right to be heard. But such an order cannot be disregarded, and *it seems*

NEW TRIAL.

it can be corrected only upon appeal, or by the same justice who made it, upon a motion before him for that purpose. *N. Y. Superior Ct. Sp. T.*, 1866, *Swift v. Wylie*, 5 *Rob.*, 641.

ARREST; ATTACHMENT; JUDGMENT, 12, 14; PLEADING, 13-15.

MUNICIPAL CORPORATIONS.

Validity of assessments, where the law requires the consent of a majority of the land owners; and liability of a corporation to an action on a contract for local improvement, for moneys received by assessment. *Baldwin v. City of Oswego*, 2 *Keyes*, 132.

BUFFALO; CAUSE OF ACTION, 9; NEW YORK (CITY OF).

NEGLIGENCE.

1. Where the defendant was employed by D. to superintend a funeral, and the plaintiff, a passenger by the invitation of D. in one of the coaches furnished by the defendant, was injured through the negligence of the driver,—*Held*, that the fact that the driver of the carriage and horses was their owner, was conclusive in establishing that the relation of master and servant did not exist; and, so far as the defendant's liability rested upon the existence of such relation, he was not responsible for the injury which the plaintiff received through the negligence of the driver. *N. Y. Superior Ct.*, 1868, *Boniface v. Relyea*, *Ante*, 259.
2. *It seems*, that the service, being upon the invitation of D., as between the plaintiff and defendant, was entirely voluntary, and without privity of contract, and that in such a case there was no responsibility for misfeasance on the part of the defendant. *Id.*

NEW TRIAL.

1. The judge who tries a cause may in his discretion entertain a motion made on his minutes, to set aside the verdict and grant a new trial, when the verdict was given by the jury in disregard of evidence making out a defense in avoidance. The power to grant a new trial on the minutes is not restricted to the case of insufficient evidence on the part of the plaintiff. *Ct. of Appeals*, 1868, *Algeo v. Duncan*, 39 *N. Y.*, 313.
2. Errors in the admission of evidence which could not have affected the judgment are not ground of new trial. *Ct. of Appeals*, 1866, *Bronson v. Tuthill*, 3 *Keyes*, 32.
3. A new trial should not be ordered on account of the erroneous admission of testimony, if the judge subsequently ordered the evidence to be struck out and the jury to disregard it, and the questions of fact which were submitted to the jury and were found in the plaintiff's favor entitled him to recover a sum of damages for which the amount of the verdict cannot be regarded as excessive. In such a case it is clear that the jury may have

- wholly disregarded the evidence which was struck out, and it is to be presumed that they did so. [Distinguishing 19 *N. Y.*, 299.] *Supreme Ct.*, 1865, *Mandeville v. Guernsey*, 51 *Barb.*, 99.
4. *It seems*, that where, without the plaintiff's own testimony, the other evidence in a cause is insufficient to sustain his or her case, it is the duty of the jury to determine whether that testimony, even if uncontradicted, is entitled to credit as probable. If they conclude it is not, they must find a verdict for the defendant. And if their verdict is founded entirely upon a material statement made by a party to the action who is examined as a witness, and such statement is not merely of doubtful credibility, but contrary to reason, and incredible, the verdict should be set aside. The credibility of a witness, his unexceptional manner, and the absence of all contradiction, are of no avail to authorize a verdict founded upon a patent impossibility. *N. Y. Superior Ct.*, 1868, *Warner v. Western Transportation Co.*, 5 *Rob.*, 490.
 5. Where a sale and delivery of goods are found, upon conflicting evidence, by a referee, the finding will not be disturbed to let in the defense of the statute of frauds. *N. Y. Superior Ct.*, 1868, *Dows v. Montgomery*, 5 *Rob.*, 445.
 6. A new trial will not be granted because the charge was too general, or because the judge assumed facts as proved, where it is apparent that the party sustained no injury by the misdirection. *Supreme Ct. Circuit*, 1845, *Deems v. Crook*, 1 *Edm.*, 95.
 7. If the jury are left to come to their own conclusions, a new trial should not be granted merely because the judge stated to them the impressions that the testimony made upon his own mind. *Ct. of Appeals*, 1868, *Winne v. McDonald*, 39 *N. Y.*, 233.
 8. An error of the jury in coming to an erroneous conclusion on a question of fact must be corrected in the general term; and if that court refuses relief, the injured party is remediless. *Ct. of Appeals*, 1864, *Godfrey v. Johnstone*, 1 *Keyes*, 556.
 9. Where the preponderance in the evidence is so decided as to lead very naturally to the conclusion that injustice has been done to a party, by the judgment recovered against him, it is the well-settled rule applicable to such cases, that the verdict should be set aside, and a new trial directed. [7 *How. Pr.*, 64, 66; 1 *Caines*, 162; 6 *Hill*, 444, 451; 20 *How. Pr.*, 384; 6 *Bosw.*, 191.] *Supreme Ct.*, 1868, *Townsend Manufg. Co. v. Foster*, 51 *Barb.*, 346.
 10. Additional evidence to support a point which was the subject of inquiry and testified to, on the trial,—such as the degree of injury to the plaintiff in an action for an assault,—is substantially cumulative; and a new trial will not be ordered on the ground of its discovery since the trial; particularly where the fact to be proved was within the knowledge of a witness examined on the former trial. *N. Y. Superior Ct. Sp. T.*, 1866, *Tripler v. Ehehalt*, 5 *Rob.*, 609.
 11. A new trial will not be granted on the ground of newly discovered ev-

NEW YORK COMMON PLEAS.

idence, where such evidence only tends to contradict the testimony given by one of the parties on her cross-examination as a witness, on facts collateral to the main issues; and the proof or disproof of which would have no effect on the case to be established, but only on the credibility of the party so examined as to other matters testified to by her. Nor is evidence which merely impeaches the veracity of a witness, of such a kind as alone to authorize a new trial to be granted on the ground of its recent discovery since the former trial. *N. Y. Superior Ct.*, 1868, *Warner v. Western Transportation Co.*, 5 *Rob.*, 490.

12. A referee's report, in an action against a municipal corporation to recover the value of property destroyed by a mob, set aside for excessiveness of damages,—see *Eastman v. Mayor, &c. of N. Y.*, 5 *Rob.*, 389.

APPEAL; COURT OF APPEALS; ERROR; EXCEPTION; TRIAL.

NEW YORK (CITY OF).

1. An action does not lie against the city of New York to recover back a tax collected by its officers; for the jurisdiction to impose and collect taxes is established by State authority, and only a small part of the money is received by the city. *Supreme Ct.*, 1868, *Union Bank v. Mayor, &c. of N. Y.*, 51 *Barb.*, 159.
2. The requirement of the charter of New York that ordinances for an assessment must be published for two days previous to adoption, does not apply to the amendment of an ordinance. *Supreme Ct.*, 1868, *Matter of Lewis*, 51 *Barb.*, 82.
3. The unanimous consent necessary to make valid an ordinance passed by both boards of the common council on the same day, sufficiently appears from the fact that no objection was made at the time, and that all the persons present voted for the ordinance. *Ib.*
4. An ordinance directing an assessment for a local improvement under the act of 1859, ch. 302, should direct the assessment to be made by the board. It is unnecessary to name them individually; and if they are so named, and there is a subsequent change in the board, this is not an irregularity for which the assessment can be set aside. *Ib.*
5. The provision of the Laws of 1857, ch. 446,—that an appropriation must be made by law before a contract for a local improvement is made,—does not apply where the expense is charged on the owners of the land, and not on the treasury. *Ib.*

NEW YORK COMMON PLEAS.

The power to grant a divorce, and the power, pending such suit, to award the custody of children, are not necessarily connected; and the court of common pleas of the city of New York has not the latter power. *Supreme Ct. Sp. T.*, 1847? *Matter of De Angelis*, 1 *Edm.*, 476.

NOLLE PROSEQUI.

In what cases it is proper for the judge to advise the district-attorney to consent to a verdict of acquittal. *People v. Harris*, 1 *Edm.*, 453.

NONSUIT.

DISMISSAL OF COMPLAINT; TRIAL.

NOTARY.

Inquiring of the holder merely, for the residence of the maker, without inquiry of other indorsers, or of persons of the same name whose address was in the directory,—*Held*, not due diligence, and that the protest made because of not finding the maker on such inquiry, was not valid. *Supreme Ct. Circuit*, 1847, *Furniss v. Holland*, 1 *Edm.*, 470.

NOTICE.

1. Notice to the comptroller of a city,—*Held*, notice to the city. [2 *Seld.*, 179.] *Ct. of Appeals*, 1864, *Hall v. City of Buffalo*, 1 *Keyes*, 193.
2. Requisites of notice to remove obstructions from piers and bulkheads in New York. *Commissioners of Pilots v. Erie Railway Co.*, 5 *Rob.*, 366.

DEMAND BEFORE SUIT.

OFFICERS.

Before a public officer should be permitted to retain in his pocket moneys which his duty required him to pay over to the plaintiff, he should be able to show a clear defense, or, in other words, he must bring himself within the statute. *Ct. of Appeals*, 1866, *Davy v. Field*, 2 *Keyes*, 608.

PARTIES.

1. An enemy adhering to an organized force at war with the government of the United States, is incapacitated from maintaining an action in the civil courts of this State. The fact that the enemy is also guilty of treason does not alter the case. [2 *Wall.*, 404.] *Ct. of Appeals*, 1868, *Sanderson v. Morgan*, 39 *N. Y.*, 231.
2. The fact that the character of a party is such as to deprive the court of jurisdiction of his person is, equally with his non-residence, sufficient excuse for proceeding without him, in a cause of equitable jurisdiction. *N. Y. Com. Pleas Sp. T.*, 1868, *Sippile v. Albites*, *Ante*, 76.
3. Where a defendant is known as well by one name as another, he may be sued and arrested by either, and it is immaterial by what name he was known to the plaintiffs in the action. *N. Y. Superior Ct. Sp. T.*, 1866, *Eagleston v. Son*, 5 *Rob.*, 640.

PARTIES.

4. If the holder of a promissory note legally has its possession, and is entitled to receive its payment, he is the proper plaintiff in its prosecution, and this without reference to who may ultimately be entitled to a participation in its proceeds. *Ct. of Appeals*, 1866, *Williams v. Brown*, 2 *Keyes*, 486.
5. The payee of a check may maintain an action thereon in his own name, although another person may be interested in the proceeds. *Ct. of Appeals*, 1864, *Fish v. Jacobsohn*, 1 *Keyes*, 539.
6. One who has covenanted with executors, as such, that third persons should satisfy and discharge a mortgage, is thereby estopped from denying the right of the executors to sue on such covenant, in their representative capacity. *Ct. of Appeals*, 1867, *Farnham v. Mallory*, *Ante*, 380.
7. In such an action, their interest in the enforcement of the covenant may be assumed. *Ib.*
8. Either one of several joint owners of claims against a third person, they not appearing to be partners, may maintain an action against an agent, to recover his share of money had and received by the latter from the debtor. *Supreme Ct.*, 1865, *Allen v. Brown*, 51 *Barb.*, 86.
9. When a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession, to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. [23 N. Y., 264.] *Ct. of Appeals*, 1867, *Dunham v. Troy Union R. R. Co.*, 3 *Keyes*, 543.
10. Warehousemen occupying a private "bonded warehouse," who hold goods of a merchant subject to the lien of government for unpaid duties under the acts of Congress of 1854 and 1862, are liable to the owner in an action for a loss of them, without joining as a defendant the revenue officer in whose custody the statute declares such goods to be. The custody intended by the statute is a guard or watch, and not legal possession for all purposes. [22 N. Y., 370; 24 *Id.*, 536; 2 *Blatchf.*, 121.] *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
11. A married woman who has taken a chattel mortgage, as married women are authorized to do by the acts of 1848 and 1849, may maintain an action in her own name for a wrongful levy on the mortgaged goods. *Ct. of Appeals*, 1866, *Wolfe v. Scroggs*, 2 *Keyes*, 491.
12. The grantee of demised premises, or the reversion thereof, is the proper party to bring suit for the recovery of rent which accrued and became due before, and *a fortiori* after the conveyance to him. After such conveyance, an action by the grantor for rent cannot be sustained. [1 *Rev. Stat.*, 747, § 23.] *Supreme Ct. Circuit*, 1846, *Anderson v. Treadwell*, 1 *Edm.*, 201.
13. The rule that each of several heirs may sue in ejectment for non-payment of rent without joining the others, applies to the case of tenants in common of an incorporeal hereditament of rents charged in fee, and no

PARTIES.

- reversion. The rents are apportioned in either case. *Supreme Ct.*, 1868, *Cruger v. McClaughry*, 51 *Barb.*, 642.
14. An action to recover land, leased by grant in fee with a reservation of perpetual yearly rent, on a breach of condition, is properly brought by the devisee of the original grantor, notwithstanding the fact that before the action he made an executory agreement for a transfer of the rents upon condition of the payment of certain sums, if it appear that the sums have not been paid, so that the other contracting party has not become entitled to the rents. And it makes no difference that the executory contract was performed, by a conveyance pending the action. *Ct. of Appeals*, 1868, *Van Rensselaer v. Barringer*, 39 *N. Y.*, 9.
 15. A conveyance in trust to the trustees of a religious corporation, for the use and benefit of the corporation, vests the title by the statute in the corporation, without a conveyance from the trustees; and hence the corporation is the proper party to maintain an action of ejectment. *Ct. of Appeals*, 1867, *Van Deuzen v. Trustees of Presbyterian Congregation*, 3 *Keyes*, 550.
 16. As to what parties can maintain an action against a defendant, treasurer of a religious corporation, for money received by him, as subscriptions and donations, for an enterprise not immediately connected with the church corporation,—see *Rector, &c. of the Church of the Redeemer v. Crawford*, 5 *Rob.*, 100.
 17. *It seems*, that the decisions of the court of appeals in *Chapman v. New Haven R. R. Co.* (19 *N. Y.*, 341), and *Colgrove v. New York and New Haven R. R. Co.* (20 *Id.*, 492), to the effect that a passenger in a vehicle or railroad car, injured by its collision with another vehicle or car, resulting from the concurrent negligence of the owners of such vehicles or cars, or their employees, may maintain a joint action against both, are in a great measure overruled by the later case of *Brown v. New York Central R. R. Co.*, 32 *N. Y.*, 597. *N. Y. Superior Ct.*, 1868, *Mooney v. Hudson River R. R. Co.*, 5 *Rob.*, 548.
 18. Those who had an interest in a vessel insured, at the time of the fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to the action. *Ct. of Appeals*, 1867, *Duncan v. Great Western Ins. Co.*, *Ante*, 173.
 19. Where an insurance company, after becoming insolvent, divides its capital among its stockholders, in fraud of its creditors, the receiver of the company, since he represents the creditors, is the proper person to bring an action to recover back the fund so distributed. No creditor can individually maintain an action against an individual stockholder for the share so illegally distributed to him; the liability is to the creditors generally, and the action should be commenced by some party representing all the creditors. *Ct. of Appeals*, 1867, *Osgood v. Laytin*, *Ante*, 1.
 20. In such an action it is proper for the receiver to join as defendants any

PAYMENT.

- creditors who have instituted such suits, and those who threaten to do so, for the purpose of protecting the stockholders from a multiplicity of actions. *Ib.*
21. Upon the death of an assignee for the benefit of creditors, pending an action in the nature of replevin, brought by him to recover damages from a sheriff for the tortious taking of assets, the proper parties to be substituted are the personal representatives of the deceased, since the action relates to personal property. *Ct. of Appeals*, 1867, *Emerson v. Bleakley*, *Ante*, 350.
 22. But, if a successor in the trust is appointed, and he is substituted as plaintiff in the action upon the consent of the defendant, the defendant cannot afterwards avail himself of the objection that the action is not properly prosecuted by him as plaintiff. *Ib.* Compare *Emerson v. Booth*, 51 *Barb.*, 40.
 23. *It seems*, that creditors of a firm cannot reach the property of a deceased partner in the hands of his surviving partner, without having some one before the court entitled to represent the estate of the deceased. *N. Y. Superior Ct.*, 1867, *Loeschig v. Hatfield*, 5 *Rob.*, 26.
 24. *It seems*, that creditors of a firm cannot proceed to set aside, as fraudulent, transfers of the interest of a deceased partner, without having some representative of it before the court as a party, and the occurrence of some delay or collusion on the part of such representative; and even then such interest can only be administered as assets to pay his debts, in due course of administration *Ib.*

PARTITION.

Effect of mistake by surveyors in the division line. *Townsend v. Hayt*, 51 *Barb.*, 334.

PAYMENT.

1. When payment of a subscription to capital stock has been made to one who is authorized to collect such subscriptions, the act of such agent, although beyond his authority, in allowing payment to be made otherwise than in money, cannot be rejected by the company after the contract is executed, so as to work to the injury of an innocent subscriber. *N. Y. Superior Ct.*, 1868, *East New York, &c. R. R. Co. v. Lighthall*, *Ante*, 458.
2. Pending litigation as to the validity of a tax, the officer charged with its collection gave notice to the corporation who were resisting the tax that, in the event of non-payment, a warrant would be issued, and thereupon, without the issue of warrant, and without any seizure, the corporation paid the tax.—*Held*, that the payment was voluntary, and that an action did not lie to recover it back. *Supreme Ct.*, 1868, *Union Bank v. Mayor, &c. of New York*, 51 *Barb.*, 159.

PLEADING.

PENALTIES.

1. Where a statute contemplates one offense but two classes of offenders,—as in the case of the Laws of 1839, ch. 13, forbidding unlicensed theatrical exhibitions, and imposing penalties on managers and owners,—an offense being one and entire, the penalty is one, and several penalties cannot be imposed on the several offenders. *Ct. of Appeals*, 1866, *People v. Koll*, 3 *Keyes*, 236.
2. The statutory penalties for encroachments upon highways are applicable not only where the highway has been “laid out” according to the law, but also where it was established by prescription. *Ct. of Appeals*, 1867, *Doughty v. Brill*, 3 *Keyes*, 612.

PLEADING.

1. A reference, by a pleader citing a general and public statute, to the wrong section of the statute, is wholly immaterial. The reference is surplusage. *N. Y. Superior Ct.*, 1867, *McHarg v. Eastman*, 35 *How. Pr.*, 205.
2. If there be two causes of action aimed at in the complaint, their junction in one action, if improper, can only be objected to by demurrer. So that although a cause of action on a warranty, and one for a false representation on the sale of the same chattels, cannot be joined if objected to, yet that does not prevent the parties from assenting to try both in one action, by not making any objection to the irregularity. *N. Y. Superior Ct.*, 1867, *Quintard v. Newton*, 5 *Rob.*, 72.
3. In an action to recover back property which had been fraudulently obtained upon credit, it is not necessary to aver that the plaintiff tendered back the notes received upon the purchase. The fact of tendering back such notes only goes to show that the plaintiff has not affirmed the contract after he had knowledge of the fraud. *Ct. of Appeals*, 1864, *King v. Fitch*, 1 *Keyes*, 432.
4. When the plaintiff's complaint may reasonably import the averment of a good cause of action, it is not to be held bad on demurrer because its language is susceptible of a construction excluding any such cause. *Ct. of Appeals*, 1868, *Olcott v. Carroll*, 39 *N. Y.*, 436.
5. A complaint is not deficient in stating a cause of action, because, after alleging valid notes, it states that they were given up and canceled on the giving by defendant of new notes, in which usurious interest was reserved for the extension of time. The plaintiff may, in such case, recover upon the original notes. *Ct. of Appeals*, 1868, *Winsted Bank v. Webb*, 39 *N. Y.*, 325.
6. Under a general complaint for work and labor, the plaintiff may recover on proof of a special contract fully completed. [7 *N. Y.* (3 *Seld.*), 476.] *Ct. of Appeals*, 1868, *Hurst v. Litchfield*, 39 *N. Y.*, 377.

PLEADING.

7. Under a complaint in an action against an agent for money had and received, the plaintiff may recover, where it appears that the defendant received notes which were good and collectable, and by his transactions he released the debtor and deprived his principal of all remedy except against himself. [6 Cowen, 183, note; 3 Mass., 403; 11 John., 464; 9 Johns., 96.] *Supreme Ct.*, 1865, *Allen v. Brown*, 51 *Barb.*, 86.
8. In an action against a carrier, under a complaint which alleges that before the arrival of the goods at their original destination, the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and so negligently acted that the goods were lost,—evidence that when the property had reached its destination the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, the carrier,—will sustain a recovery, there being no objection taken at the trial to the variance. *Ct. of Appeals*, 1867, *Rosebrooks v. Dinsmore*, *Ante*, 59.
9. An objection at the trial might be obviated by amendment. *Ib.*
10. A pleading which sets up mere partial intoxication or weakness of mind at the time of executing an instrument, in order to avoid its obligations, is not sufficient unless some circumstances of fraud or undue influence are added. The intoxication must be so complete as to deprive the party of the use of his reason, or the mental infirmity must amount to senile demency, to constitute by themselves a defense. *N. Y. Superior Ct. Sp. T.*, 1866, *Burns v. O'Rourke*, 5 *Rob.*, 649.
11. In an action against sureties, to recover rent, the defendants alleged in their answer, and proved, that they understood they were to be sureties as for a rent of \$900, and that the guaranty was executed by them under a mistake of facts; but it was not averred in the answer, or proved, that the plaintiff had the same understanding of the agreement.—*Held*, that neither the matter set up in the answer, nor the proof, was sufficient to authorize a reformation of the contract, so as to conform it to the understanding of the defendants. *N. Y. Superior Ct.*, 1867, *Lanier v. Wyman*, 5 *Rob.*, 147.
12. A plea of accord and satisfaction is not supported by proof of a tender made to the plaintiff's attorney, who declined to accept it as satisfaction; for one of the essentials to the validity of such a plea, viz: an acceptance, is wanting. *N. Y. Superior Ct.*, 1867, *Hammond v. Christie*, 5 *Rob.*, 160.
13. The remedy for superfluous matter in a complaint,—such as an allegation of abandonment, in an action for divorce on the ground of adultery,—is by motion, not by demurrer, although such matter be stated in a form appropriate to a separate cause of action. *Supreme Ct. Sp. T.*, 1868, *Ward v. Ward*, *Ante*, 145.
14. *It seems*, that section 152 of the Code of Procedure,—providing that sham and *irrelevant answers* may be stricken out,—does not authorise the striking out the whole or part of an answer as *redundant*. The first clause of section 160 of the Code,—under which irrelevant or *redundant*

QUESTIONS OF LAW AND FACT.

matter in the pleading may be stricken out,—does not authorize an *entire answer* or an *entire defense* to be stricken out as irrelevant or redundant. *Supreme Ct.*, 1869, *Fasnacht v. Stehn*, *Ante*, 338.

15. The denial of a motion to strike out an answer as frivolous does not prevent a motion to strike it out as sham. *Supreme Ct. Sp. T.*, 1868, *Kreitz v. Frost*, *Ante*, 277.

AMENDMENT; ANSWER; COMPLAINT; SUPPLEMENTAL PLEADING; VARIANCE.

PRINCIPAL AND AGENT.

1. An agent cannot create an authority in himself to do a particular act, by its performance, or by asserting his authority to do it. To bind the principal, the agency must be established, and one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge must be proved. *Ct. of Appeals*, 1867, *Stringham v. St. Nicholas Ins. Co.*, *Ante*, 80.
2. *It seems*, that if a principal sanction the performance of a duty by persons in his employment other than the one who is actually the agent having charge of that particular department, having thus held out to the world that they are authorized agents, he cannot relieve himself from responsibility by repudiating their acts. *Grosvenor v. New York Central R. R. Co.*, *Ante*, 345.

PROHIBITION (WRIT OF).

A writ of prohibition is the proper remedy to forbid a county judge from acting on the application of freeholders for the appointment of commissioners to carry into effect a statute for borrowing money on the credit of the town, to aid in the construction of a railroad, if the statute in question is unconstitutional. The act of a county judge in such case, required by the statute to be exercised under the seal of office, and involving the exercise of judgment and discretion in the selection of commissioners, is a judicial and not a ministerial act. *Supreme Ct.*, 1868, *Sweet v. Hulbert*, 51 *Barb.*, 312.

QUESTIONS OF LAW AND FACT.

1. Where the facts are undisputed, the question whether they constitute a tender is purely a question of law, and cannot be reviewed in the court of appeals. [9 *N. Y.*, 464; 10 *Id.*, 466.] *Ct. of Appeals*, 1868, *Whelock v. Tanner*, 39 *N. Y.*, 481.
2. In an action on a policy of fire insurance, the objection that the building, a mill, was left unwatched, and that combustible materials were left in it, are not to be raised by requesting the judge to charge that this avoided the policy, but by submitting such circumstances as questions of fact to the jury. *Ct. of Appeals*, 1868, *Le Roy v. Park Fire Insurance Co.*, 39 *N. Y.*, 56.

RECORDING DEEDS.

3. Where an indorser, who has done nothing to waive or dispense with notice of protest, fails to receive the notice, the question of his liability becomes one of diligence on the part of the holder; and this is a question partly of fact and partly of law, to be determined according to the circumstances of each case. *Ct. of Appeals*, 1868, *Bartlett v. Robinson*, 39 *N. Y.*, 187.
4. Deviation in marine insurance must be determined by the motives, end and consequence of the act, and is a question of fact to be decided according to the circumstances of the case. *Supreme Ct. Circuit*, 1846, *Foster v. Jackson Marine Ins. Co.*, 1 *Edm.*, 290.
5. When fraud in the purchase of goods is a question for the jury. *Byrd v. Hall*, 2 *Keyes*, 646; *Johnson v. Monell*, 2 *Id.*, 655.
6. When fraud in a mortgage in a question for the jury. *Ostrander v. Fay*, 2 *Keyes*, 586.
7. Whether the cutting of trees and timber is an injury to the inheritance or not, is necessarily a question of fact, depending upon the circumstances of the case, and belongs to the jury. *Supreme Ct.*, 1868, *McCay v. Wait*, 51 *Barb.*, 225.
8. Negligence a question of fact for the jury. *Supreme Ct.*, 1867, *Wooden v. Austin*, 51 *Barb.*, 9; *Burrill v. Watertown Bank*, *Id.*, 105.

REAL PROPERTY.

A building erected upon the land of one person by another person, without any authority or agreement in respect thereto, becomes a part of the realty, and passes with a conveyance of the land. *Ct. of Appeals*, 1866, *Ritchmyer v. Morss*, *Ante*, 44.

RECEIVER.

1. The executive committee of a joint stock company have no right to vote moneys to themselves, in addition to their regular compensation, for extra services previously rendered, or in consideration of their retirement; and a receiver will be appointed to recover back such moneys for the benefit of the company. *Supreme Ct. Sp. T.*, 1869, *Blatchford v. Ross*, *Ante*, 434.
2. An assignment to the receiver, in a judgment creditor's suit, is in the nature of a mortgage, and becomes void so soon as the object of the suit is accomplished. Its purpose having been fulfilled, the property which passed under it reverts to the grantee, without any reassignment. [2 *Wend.*, 509.] *Supreme Ct. Circuit*, 1846, *Anderson v. Treadwell*, 1 *Edm.*, 201.

RECORDING DEEDS.

1. A deed of land is not rendered invalid by the fact that a consideration is not paid; and where the grantor executed a second deed of the same

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- land to the defendant D., who had actual knowledge of the prior deed, but recorded his deed before the prior deed had been recorded; and after the prior deed had been recorded, conveyed the land for a valuable consideration to the defendant E., who had no actual notice of the prior conveyance.—*Held*, that the latter occupied no better position than the defendant D., and that the first grantees could recover possession of the land. *Ct. of Appeals*, 1867, *Ring v. Steele*, 3 *Keyes*, 450.
2. Effect of record of mortgage and of assignment of mortgage. *Campbell v. Vedder*, 3 *Keyes*, 174. Compare *Fisk v. Potter*, 2 *Keyes*, 64.

REFERENCE.

1. Referees now possess all the powers of the *court* in regard to amendments of pleadings; and their allowance or disallowance of an amendment can only be reviewed, if at all, in the manner other decisions of the same kind made by the court are reviewed, viz: on appeal. *N. Y. Superior Ct.*, 1866, *Woodruff v. Dickie*, 5 *Rob.*, 619.
2. It is the duty of a referee before whom all the issues in an action are tried, to insert in his report, when required, his findings of facts and conclusions of law. The facts so required to be found, should be those forming part of the issues presented by the pleadings, and not those merely evidentiary of them. Where the defense was that the defendant delivered the note sued on to one C., to be discounted at a bank for the benefit of the defendant, which was not done by him, and that the plaintiff was not the holder and owner of such note for a *bona fide* consideration before it became due;—*Held*, that the defendant had a right to have those questions specially passed upon in the report; and that the referee might be, therefore, directed to amend his report by inserting therein his findings upon them, to wit, the delivery of the note by the defendant to C., and its purpose; the acquisition of the ownership of such note by the plaintiff, before its maturity, and the *bona fides* of the consideration given by him therefor. *N. Y. Superior Ct. Sp. T.*, 1866, *Lane v. Borst*, 5 *Rob.*, 609.
3. Where a contractor for letting the contract of a railway sued a carrier for breach of contract to carry for him the ties, &c.,—*Held*, that the finding of the referee that the defendant agreed to carry and deliver ties, spikes, and other materials, was sustained by the testimony that the defendant undertook to distribute the ties, and do the work for the plaintiff, although it did not appear that the spikes were specifically mentioned. *Ct. of Appeals*, 1867, *Wilson v. New York Central R. R. Co.*, 3 *Keyes*, 381.

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Jurisdiction of justices of the peace in the city of Rochester. *Dawson v. Horan*, 51 *Barb.*, 459.

SET-OFF.

SCHOOL DISTRICT.

An assessment and a tax warrant made by two of three trustees of the school district, the third taking no part in the matter, not being present, nor having ever been notified to meet for the purpose, is void, and affords no protection in seizing property for payment thereof. *Ct. of Appeals*, 1866, *Lamoreaux v. O'Rourke*, 2 *Keyes*, 499.

SERVICE (AND PROOF OF).

1. The court is bound to consider the service as made at the time stated in the proof of it, after a motion to set judgment aside, because of alleged want of service, has been denied; and if such service appears therein to have been more than ten years ago, and no excuse is offered for the laches in not applying before, a motion to open the judgment and let the defendant in to defend, will be denied. *N. Y. Superior Ct. Sp. T.*, 1866, *Weeks v. Merritt*, 5 *Rob.*, 610.
2. When the indorser of a note appends to his indorsement the street and number of his address, this is to be regarded as a qualification of the indorsement, and imports that the service of notice, if not personal, should be by delivery at the place designated. *Ct. of Appeals*, 1868, *Bartlett v. Robinson*, 39 *N. Y.*, 187.
3. In such case, if the holder relies upon a notice served under the statute of 1857,—allowing such service, by mailing the notice, directed to the indorser at the city or town of his residence,—the street and number are a necessary part of the direction; and, if they are not inserted, and the indorser fails to receive the notice, he is not bound. *Ib.*

SET-OFF.

1. Under the Revised Statutes, a claim existing against the assignor, in the favor of the maker, of a promissory note, assigned before it became due, cannot be set off against the note in the hands of the assignee; and this, although he had notice of the offset before the transfer, for such notice is not notice of any existing legal defense. *Ct. of Appeals*, 1866, *Williams v. Brown*, 2 *Keyes*, 486.
2. Section 112 of the Code of Procedure,—which provides, in case of an assignment of a thing in action, that the action by the assignee shall be without prejudice to any set-off or other defense existing at the time, or before notice of the assignment,—does not apply to such a case; for by the second clause of that section, negotiable promissory notes and bills of exchange transferred in good faith, and upon good consideration, before due, are expressly excepted. *Ib.*
3. A loss incurred by a solvent assured, under a policy issued by an underwriter, who becomes insolvent after issuing the policy and before the loss,

SLANDER.

- is a *mutual debt or credit* within the meaning of the statutes as to trustees of insolvent debtors, capable of being set off against the premiums upon such policy, although such loss was, by the terms of the policy, not payable until some time after proof of loss and interest, and no such proof was presented before such insolvency. [Following but questioning *Osgood v. De Groot*.] *N. Y. Superior Ct.*, 1868, *Pardo v. Osgood*, 5 *Rob.*, 348; reversing *S. C.*, 2 *Abb. Pr. N. S.*, 365.
4. Set-off of a judgment adverse to a receiver, against the receiver's demand on the judgment creditor. *Clark v. Brockway*, 3 *Keyes*, 13.

SHERIFF.

1. A sheriff has no right to withhold from the plaintiff money collected by him *colore officii*, under an execution issued out of the wrong court. [1 *Wend.*, 16; 15 *Id.*, 575.] *Supreme Ct. Circuit*, 1846? *Graydon v. Stone*, 1 *Edm.*, 221.
2. When, with full knowledge of such error, and while in custody under an attachment, founded on the execution, the sheriff promised to pay the money to the plaintiff, his discharge from custody was held a sufficient consideration for the promise. *Ib.*

SHIPPING.

1. A lien given by a State statute on domestic ships, for repairs or supplies, such as would be the matter of a suit in admiralty *in personam*, cannot be enforced under the State statute, in the courts of the States. The exclusive cognizance conferred on the district courts of the United States in matters of admiralty and maritime jurisdiction, excludes all jurisdiction from the State courts except such concurrent remedy as is given by the common law. *Ct. of Appeals*, 1868, *Matter of The Josephine*, 39 *N. Y.*, 19; reversing 50 *Barb.*, 501.
2. A theater erected on the deck of a steamboat, for the purpose of being transported from place to place, for exhibition, and conveying the performers and theatrical "properties," is part of the vessel, within the meaning of 2 Revised Statutes, 405, § 1; and the vessel is liable to attachment for the price of materials used in constructing the theater. *Supreme Ct. Chambers*, 1845, *Matter of the Virginia*, 1 *Edm.*, 98.

SLANDER.

1. To charge a person with "keeping a whore-house," is, in itself, actionable, for, by common acceptance, it imputes keeping a house for common prostitution, which is a crime involving moral turpitude, and is an indictable offense. [13 *Johns.*, 124; 9 *Wend.*, 141; 13 *Barb.*, 221; 3 *Den.*, 101; 4 *Id.*, 129; 3 *Hill*, 21.] *Ct. of Appeals*, 1867, *Wright v. Paige*, 3 *Keyes*, 581; affirming 36 *Barb.*, 438.
2. It is not essential, in order to show such words actionable, that the wit-
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nesses should testify that they understood the defendant to convey such meaning by the words spoken. It is for the witness to state the words, and the circumstances under which they were uttered; and their import is for the court and jury to determine. *Ib.*

3. Words imputing to a mechanic want of skill, or knowledge in his craft, are actionable *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill. *Supreme Ct.*, 1868, *Fitzgerald v. Redfield*, 51 *Barb.*, 484; S. C., 36 *How. Pr.*, 97.
4. In an action for slander in charging the plaintiff with perjury, if it appear that the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed, the impression that the plaintiff had committed perjury, and that the defendant intended to be so understood by those who heard him, such words will of themselves warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood; and it is not necessary to give additional evidence that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely with a corrupt intent. *Supreme Ct.*, 1867, *Kern v. Towsley*, 51 *Barb.*, 385.

SPECIFIC PERFORMANCE.

A gift of land, having been partly executed, may be enforced by an action for specific performance. *Supreme Ct.*, 1868, *Freeman v. Freeman*, 51 *Barb.*, 306.

STATUTES.

1. Under a statute requiring supervisors to raise such sum as may be found due to certain claimants, and the comptroller to pay said amount when the same shall be judicially determined, the judicial determination is not a condition precedent to the authority of the board of supervisors to raise the money. A mandamus may issue to compel them to raise it, leaving the judicial determination to be had before payment. *Ct. of Appeals*, 1865, *People v. Board of Supervisors, &c.*, 2 *Keyes*, 288.
2. A provision in the charter of a city declaring all the general laws of the State relative to proceedings before justices of towns applicable to proceedings before the city justices,—*Held*, to embrace subsequent, as well as prior, enactments, and to include a statute extending the jurisdiction of justices which was passed on the same day as the city charter. *Supreme Ct.*, 1868, *Dawson v. Horan*, 51 *Barb.*, 459.

SUMMARY PROCEEDINGS.

1. Proceedings under the statute for the summary recovery of possession of demised premises, must be against the person in possession, or claiming

SUPREME COURT.

- the possession ; and a landlord, by taking such proceedings, is not precluded from showing a different party to have been, in fact, his lessee, or liable to him under an agreement creating a tenancy. *Supreme Ct. Circuit*, 1846, *La Farge v. Park*, 1 *Edm.*, 223.
2. A parol lease of premises, from their owner, is a perfectly good defense to any proceedings to eject the lessee summarily, or to an action to recover the possession of the land. Against unlawful violence the tenant has the protection of magistrates and the police, if unable to resist it by himself alone. A court of equity is not a proper tribunal to prevent or redress such wrongs. *N. Y. Superior Ct. Sp. T.*, 1866, *Supp v. Kensing*, 5 *Rob.*, 609.
3. The act of Apr. 27, 1847,—giving the right of peremptory challenge upon the trial of an issue of fact joined in a civil action,—does not apply to such an issue in summary proceedings by the landlord against the tenant to obtain the possession of demised premises ; and section 36 of the statute, as amended by the act of April 3, 1849 (*Laws of 1849*, ch. 193),—which declares that six of the persons so summoned shall be drawn in like manner as jurors in justices' courts,—does not extend the right of challenge to such cases. *Ct. of Appeals*, 1868, *People v. Hamilton*, 39 *N. Y.*, 107.

SUPPLEMENTAL PLEADING.

Where the defendants in a creditor's suit asked leave to serve a supplemental answer, setting up their discharge in bankruptcy, and it did not appear whether the plaintiffs had disclosed their claim of lien on proving their debt in bankruptcy,—*Held*, that leave to interpose the supplemental answer must be granted. *N. Y. Com. Pleas Sp. T.*, 1868, *Stewart v. Isidor*, *Ante*, 68.

SUPPLEMENTARY PROCEEDINGS.

1. Property held in trust for a debtor, and for his benefit, or arising out of a fund proceeding from a third person in trust to secure to the debtor personally a support, cannot be reached or taken by a judgment creditor, by means of proceedings supplementary to execution. *Ct. of Appeals*, 1866, *Locke v. Mabbett*, 2 *Keyes*, 457.
2. The provisions of section 297 of the Code were never intended to be applicable, except to a case where it is clearly established, or is admitted, that the party upon whom the order is to be made, has in his hands property of the judgment debtor, or is indebted to him. If these facts are not established, the proper course is to appoint a receiver with leave to sue in equity to ascertain if there be any surplus by an accounting. *Ib.*

SUPREME COURT.

1. The *certiorari* authorized by statute, to bring up for review the summary proceedings instituted before a justice of the peace to remove a ten-

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- ant holding over his term, requires the supreme court to review any question of law arising either in the proceedings or upon the trial; also, all questions of law arising upon the rulings of the court as to the challenge of jurors, or the admissibility of evidence or the charge to the jury. *Ct. of Appeals*, 1868, *People v. Hamilton*, 39 *N. Y.*, 107.
2. The office of the writ of *certiorari*, when issued out of the supreme court to review the proceedings and determinations of the inferior tribunals, extends, unquestionably, to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well-settled principles of the common law. [20 *Johns.*, 80; 6 *Wend.*, 566; 10 *Id.*, 421; 15 *Id.*, 452; 8 *Cow.*, 13, 16; 7 *Id.*, 108, 136, 137; 17 *Wend.*, 464; 20 *Id.*, 103; 2 *Hill*, 9, 11; *Id.*, 398; 6 *How.*, 25; 6 *Cow.*, 570; 2 *Wend.*, 395; 5 *Id.*, 98; 32 *Barb.*, 131; 43 *Id.*, 232; 3 *Seld.*, 152; 3 *Kern.*, 223; 23 *N. Y.*, 192, 222; 26 *Id.*, 163.] *Ct. of Appeals*, 1868, *People v. Board of Assessors*, 39 *N. Y.*, 81.
 3. On a common law *certiorari*, the court may go beyond the inquiry, whether the inferior tribunal has jurisdiction of the person and subject-matter, and whether its proceedings and judgment were within that jurisdiction; and may examine the case upon the whole evidence, to ascertain whether any error has been committed in the proceedings before such inferior tribunal. [Reviewing many authorities.] *Ct. of Appeals*, 1868, *People v. Board of Police*, 39 *N. Y.*, 506.

SUSPENSION OF POWER OF ALIENATION.

Where it is apparent from the whole frame of the will that the testator did not contemplate any of his children dying before coming of age, but limited the distribution of the estate upon the majority of the youngest child, the bequest may be regarded dependent on the life or minority or that child alone, and is not void as suspending the power of alienation beyond the period of two lives. *Supreme Ct.*, 1868, *Burke v. Valentine*, *Ante*, 164.

TAXES.

How lands are to be sold for taxes, and upon whom notice to redeem must be served. *National Fire Ins. Co. v. McKay*, *Ante*, 445.

TENDER.

The deposit in bank of money to pay a note drawn payable at such bank, is not a payment, but simply a tender; and if pleaded in the suit thereafter brought, it bars recovery of interest subsequent to the tender, and of costs subsequent to payment into court, if plaintiff accepts the money;

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but if he does not, and defendant on the trial establishes his tender, it bars the recovery of interest subsequent to the tender, and all costs, and entitles defendant to costs; but the plaintiff is still entitled to recover the amount of the note. *N. Y. Superior Ct. Sp. T.*, 1867, *Hill v. Place*, *Ante*, 18.

TRADEMARKS.

1. A manufacturer cannot acquire a special property in an ordinary term or expression, as his trademark, the use of which as an entirety is essential to the correct and truthful designation of the particular article or compound. *N. Y. Com. Pleas Sp. T.*, 1868, *Town v. Stetson*, *Ante*, 218.
2. Thus a dealer in salt fish cannot maintain an exclusive claim to the use of the term "dressed codfish" as a trademark. It is only by the prefix of some other word not previously applied in that connection, and not essential to the truthful designation of the article produced, that he can be protected in its exclusive use. *Ib.*

INJUNCTION.

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1. Where the issue formed by the first defense in an answer amounts to a plea of *nul tiel record*, it is improper for such issue to be tried by a judge on a motion for judgment; for it is an issue of fact to be tried by a jury. *Supreme Ct.*, 1869, *Fasnacht v. Stehn*, *Ante*, 338.
2. The circumstance that a defendant excepts to a finding of facts and to conclusions of law by a judge, does not amount to a waiver of a trial by a jury, or estop him, on appeal, from taking the ground that the trial by the judge at chambers was irregular. *Ib.*
3. Under the statute of New York,—which declares that an insane person shall not be tried, but is silent as to the manner of ascertaining the insanity,—the inquiry should properly be made before the trial of the issue, and a jury should be impaneled for the purpose. *N. Y. Oyer & T.*, 1845, *People v. Kleim*, 1 *Edm.*, 13.
3. Any irregularity attending the drawing of jurors, which does not change the persons who are to compose the jury, does not tend to affect the rights of the prisoner, and will not be good cause of challenge to the array. *Ct. of Appeals*, 1866, *Friery v. People*, 2 *Keyes*, 424.
4. The purpose of the provisions of the statute relative to the drawing of juries, is, primarily, to secure a uniform distribution of jury duty, and to guard against fraud or favoritism of officers. Where the machinery is perverted so as to injure litigants, it is the act of perversion that becomes cause for challenge, and not the mere omission to properly work the machinery, when no injury or prejudice comes to the litigants. *Ct. of Appeals*, 1866, *Friery v. People*, 2 *Keyes*, 424.
5. The mere expression of an opinion by the officer, designated by law to

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- summon jurors, as to the merits of a cause that may chance to be on the calendar of a court for trial, or in respect to the guilt or innocence of a party under indictment, is not matter for challenge to the array. *Ct. of Appeals*, 1866, *Friery v. People*, 2 *Keyes*, 424.
6. It is not a good cause of principal challenge, that a presented juror, from what he has heard or read of a particular transaction, has an opinion that a crime has been perpetrated by somebody. And when such juror is challenged for favor, it is not proper to charge the triers that he may be biassed by the opinion that a crime has been committed; but the triers should be instructed to determine the question according as they think the juror is impartial, and has no bias against the prisoner, or the contrary. *Ib.*
 7. Of the proper instructions to triers in such cases. *Ib.*
 8. One who has read in a newspaper an account of the transaction, which he believes, is not thereby disqualified from serving on the jury, if he can, notwithstanding, find a verdict according to the evidence. An opinion formed from reading a newspaper account of the transaction will not disqualify the juror, unless it is such a settled opinion that he could not disregard what he has read out of court, and render his verdict on the evidence alone. [3 Den., 124.] *N. Y. Oyer & T.*, 1848, *People v. Hayes*, 1 *Edm.*, 582.
 9. Jurors not to be excluded because they have heard an admission of guilt uttered by the prisoner when he was arraigned for trial. *People v. Campbell*, 1 *Edm.*, 307.
 10. An opinion, formed or expressed, will disqualify, whether founded on knowledge of the facts, or on information derived from those who had such knowledge, or on mere rumors, or newspaper reports, whether a fixed and decided opinion, or not, and whether founded on belief or not; and it makes no difference whether the challenge is for principal cause or to the favor. *Supreme Ct. Circuit*, 1845, *People v. Bodine*, 1 *Edm.*, 36, 93.
 11. Of the proper form of inquiry, on the challenge of a juror, as to whether he has formed an opinion. *People v. Bodine*, 1 *Edm.*, 36, 82.
 12. A juror who has conscientious scruples against the punishment of death, is disqualified from sitting in a case of murder, even though he is not a member of any religious denomination having such scruples. *N. Y. Oyer & T.*, 1845, *People v. Jones*, 1 *Edm.*, 112.
 13. After challenge for principal cause on account of bias, was overruled,—*Held*, that the prisoner could not challenge the same juror to the favor, on account of bias, for this would be permitting him to appeal from the court to the triers. *Supreme Ct. Circuit*, 1845, *People v. Bodine*, 1 *Edm.*, 36, 83.
 14. Where the prisoner challenges a juror for principal cause, and, his challenge being overruled, he then challenges him peremptorily, he cannot thereafter insist on his exceptions to overruling the challenges for

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- principal cause, or for instructions given by the court to the triers. *Ct. of Appeals*, 1866, *Friery v. People*, 2 *Keyes*, 424.
15. Where the complaint and the prayer for relief are such as to embrace both equitable and legal remedies, the defendant may move the court to compel the party to elect on which part of the case he will proceed, or for which mode of trial or resulting relief he will go; but if he does not do so, he cannot object on appeal to the mode of trial. *Ct. of Appeals*, 1863, *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 1 *Keyes*, 72.
 16. It is the business of counsel to make the offer sufficiently broad to justify the evidence. *Ct. of Appeals*, 1866, *Harris v. Rathburn*, 2 *Keyes*, 312.
 17. An offer of evidence is properly ruled out wholly, if testimony clearly inadmissible is coupled with that which in itself might be admissible. *N. Y. Superior Ct.*, 1868, *Stevens v. Rhineland*, 5 *Rob.*, 285.
 18. A general objection to depositions, made before they are read, and expressed to be an objection to all such parts thereof as involved matter of opinion as to the capacity of a person referred to, is not specific enough to raise the question of the admissibility of such opinions. *Ct. of Appeals*, 1868, *Champney v. Blanchard*, 39 *N. Y.*, 111.
 19. In an action of slander in imputing the crime of perjury, an offer to prove that in the suit referred to plaintiff was sworn as a witness, and gave material testimony which was untrue, is not sufficient either as a justification or in mitigation of damages, unless it is also stated that plaintiff knew the testimony given by him to be false, or that he testified corruptly. *Supreme Ct.*, 1868, *Gorton v. Keeler*, 51 *Barb.*, 475.
 20. In an action to recover back property which had been fraudulently obtained on credit, it is unnecessary that the plaintiff cancel the notes of the defendant,—it will be sufficient if he produce them on the trial. *Ct. of Appeals*, 1864, *King v. Fitch*, 1 *Keyes*, 432.
 21. Upon the trial of an action by the receiver of an insurance company, upon a premium note given for a policy, and assessed for losses in the hazardous department, if the defendant designs to rely on the absence of proof that his note was in the hazardous department, he should make objection, or have the question submitted to the jury. *Ct. of Appeals*, 1865, *Sands v. Shoemaker*, 2 *Keyes*, 268.
 22. A leading question held to be within the discretion of the referee. *Vrooman v. Griffiths*, 1 *Keyes*, 53.
 23. On a trial of an indictment where the defense of insanity is interposed, the opinion of a medical witness as to whether the prisoner is insane should not be admitted until after all the testimony relative to the question of sanity has been given. *N. Y. Oyer & T.*, 1845, *People v. Kleim*, 1 *Edm.*, 13.
 24. The proper form of the question is, Assuming the facts to be true which you have heard testified to, what is your opinion as to the prisoner's sanity or otherwise? *Id.*

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25. Where evidence is given tending to impeach a witness, it is not essential to make out the impeachment that witnesses should be produced to swear that they would not believe the other witness under oath. This question, though now held admissible, is not absolutely essential to a successful impeachment. *Ct. of Appeals*, 1867, *Wright v. Page*, 3 *Keyes*, 581; affirming 36 *Barb.*, 438.
26. Parol proof of a contract was given, and, upon cross-examination, it appeared that the contract had been reduced to writing;—*Held*, that the denial by the referee of a motion by defendant to strike out this parol testimony as secondary, in view of a written contract, was error. *Ct. of Appeals*, 1867, *Hatch v. Pryor*, 3 *Keyes*, 441.
27. On a question of nonsuit, all disputed facts are to be decided in favor of the plaintiff. *Ct. of Appeals*, 1867, *Cook v. New York Central R. R. Co.*, 3 *Keyes*, 476.
28. After the defendant has, by an objection, excluded positive testimony of negligence, offered by the plaintiffs, he should be estopped from moving to dismiss the complaint for want of that proof. [30 *N. Y.*, 226.] *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
29. Where the proof introduced, after a motion to dismiss the complaint, sustains the verdict, this will cure any error in the refusal to grant the motion. [33 *Barb.*, 495.] *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
30. In an action for damages from the collision of two vessels, where the question of the negligence of the defendants depends upon the fact whether it was so light that the crew of their vessel could see the plaintiff's vessel, and there is conflicting evidence upon that point, such question of fact ought to be submitted to the jury; and their verdict upon such a question of negligence is controlling. *N. Y. Superior Ct.*, 1868, *Delafield v. Union Ferry Co.*, 5 *Rob.*, 207.
31. At the trial of an action by the proprietor of a play, to recover damages for its public representation by the defendant, the latter is entitled, in case of doubt upon the subject, however slight the evidence, to have the question submitted to the jury, whether the copy of such play, used by him in its production, was obtained from recollections of a performance. The following questions are also such as should be left to the jury, where there is evidence upon them, viz: whether the proprietor of a play has had it performed so frequently, for such a period, and at so many places, as to warrant the ordinary conclusion, that she did not intend to withhold the knowledge and use of it from the public, but to confine her expectations to the superiority of her mode of performing it; whether, by such frequent performance, she had not enabled it to be so universally represented by means of recollections originating in such performances as to destroy her right; and whether the copy used by the defendant was lawfully so obtained. The defendant should also be allowed to prove the number of times and places where performances were given previous to the time when he represented such play, as such evi-

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- dence is material in establishing abandonment. *N. Y. Superior Ct.*, 1867, *Keene v. Clarke*, 5 *Rob.*, 38.
32. What evidence is sufficient to go to the jury on the question whether an architect was employed by the defendant. *Nourry v. Lord*, 2 *Keyes*, 617.
33. If, where there is evidence tending to prove a fact, the judge assume in his charge that the fact was proved, a party objecting to such assumption must request to have the question submitted to the jury; if he do not, he will be deemed to have acquiesced in it. Without such request, an exception to the ruling of the court only brings up the question of law based on such assumption of fact. *Ct. of Appeals*, 1867, *Mallory v. Tioga R. R. Co.*, *Ante*, 420.
34. Rules of evidence and charge in an action by a husband against a third person for harboring his wife. *Barnes v. Allen*, 1 *Keyes*, 390.
35. Where there is evidence to support the complaint in an action, the case should be submitted to the jury, though the evidence be conflicting. It would be error in such case to dismiss the complaint. *Ct. of Appeals*, 1867, *Howell v. Gould*, 3 *Keyes*, 422.
36. A judge is not at liberty to instruct a jury to base their findings on an hypothesis unwarranted by the evidence. [15 *N. Y.*, 524.] *Ct. of Appeals*, 1866, *Rouse v. Lewis*, 2 *Keyes*, 352.
37. A request to charge should not require a judge to assume in his charge matter of fact upon which the jury are to pass. *Supreme Ct. Circuit*, 1845, *Deems v. Crook*, 1 *Edm.*, 95.
38. It is not error for the court to refuse to charge that the facts proved raise a presumption of law of the liability of the defendants, where there is also evidence to raise a contrary presumption. The question, in such case, is entirely within the province of the jury. *Ct. of Appeals*, 1865, *Downs v. Sprague*, 2 *Keyes*, 57.
39. Where the case calls for no charge on the subject of insanity, no exception lies for neglect or refusal so to charge. [32 *N. Y.*, 715.] *Ct. of Appeals*, 1866, *Wagner v. People*, 2 *Keyes*, 684.
40. The counsel presented a theoretical proposition which was assented to by the judge, with the remark that he should charge thereafter, as to the law of this case,—*Held*, that here was no ground for an exception. *Ct. of Appeals*, 1866, *Robbins v. Dillaye*, 2 *Keyes*, 506.
41. *It seems*, that a court is not bound, in instructing a jury, to pronounce upon every proposition that may be conceived to have some bearing on the case, but only those which the evidence either warrants, or might naturally give rise to in the minds of the jury. *N. Y. Superior Ct.*, 1868, *Schwerin v. McKie*, 5 *Rob.*, 404.
42. Proper terms of charge on a question of disputed boundary. *Ratliffe v. Gray*, 3 *Keyes*, 510.
43. Under an indictment framed under 2 *Rev. Stat.*, 665,—for shooting at A. with intent to kill her, and proof of shooting at B. with intent to kill him, and actually hitting A., a request on the part of the prisoner to

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charge that he could not be convicted of any offense for shooting A., is too broad; and it is not error to refuse to charge accordingly. The prisoner may be convicted of unlawful firing at one and hitting another. *Ct. of Appeals*, 1866, *Hollywood v. People*, 3 *Keyes*, 55.

44. The court is bound to take the facts, as they are stated in the case to have been found by the judge or referee, and compare the judgment rendered with those statements of fact, and, if the judgment is in conformity with the facts as found, it cannot be disturbed. *Ct. of Appeals*, 1865, *Farnham v. Hotchkiss*, 2 *Keyes*, 9.

AMENDMENT; EVIDENCE; EXCEPTIONS; WITNESS.

TRUSTS AND TRUSTEES.

1. A mortgage upon real property, executed to the mortgagee in trust to collect and apply the principal and interest, is a trust in personal property; and if the trust is perfectly defined, so as not to rest in the discretion of the trustee, his executor may maintain an action for the foreclosure of the mortgage. *Ct. of Appeals*, 1867, *Bunn v. Vaughan*, *Ante*, 269.
2. In such an action a pass-book kept by the deceased trustee, containing entries of payments of interest, may be admitted in evidence. *Ib.*
3. A trustee will not be permitted to make profit for himself out of the trust property, and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title; and purchases by a trustee in such cases accrue to the benefit of the trust fund. This principle applies without reference to the question of the fairness or unfairness of the transaction. *Ct. of Appeals*, 1867, *Colburn v. Morton*, *Ante*, 308.
4. A trustee, receiving his commission, cannot charge in addition a counsel fee for himself, although he be a lawyer. [1 *Johns. Ch.*, 26.] *Ct. of Appeals*, 1863, *Binsse v. Paige*, 1 *Keyes*, 87.

ACCOUNTING, 3.

UNDERTAKING.

1. Upon an undertaking given in an action of claim and delivery, for the payment of a fixed sum, and not conditioned for the return of the goods, interest may be awarded upon the amount of the penalty from the date of judgment in the original action; because after the recovery the sureties are in default, and the neglect to pay puts them in the wrong. [18 *N. Y.*, 35.] *Supreme Ct.*, 1868, *Emerson v. Booth*, 51 *Barb.*, 40.
2. Under the usual undertaking on appeal by which a surety stipulates to pay the costs and damages on such appeal, and to pay the amount of the judgment, &c., if the judgment be affirmed, the liability of the surety accrues only after an affirmance upon that appeal of the then existing judgment. An interlocutory order of affirmance reserving leave to answer and litigate further, followed by new pleadings and a new judgment upon

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the new issue, does not render the sureties liable. *Ct. of Appeals*, 1866, *Poppenhusen v. Seeley*, 3 *Keyes*, 150.

3. An undertaking or bond, construed to relate only to an action pending against the obligees at the time when it was given. *Beach v. Endress*, 51 *Barb.*, 570.

VAGRANTS.

- A record of conviction stating that the prisoner was "a vagrant,—namely, a common prostitute, who has no lawful employment whereby to maintain herself,"—is sufficient to show an offense within the cognizance of the magistrate; but if it does not state that the accused was brought before the magistrate, or even summoned to appear, the proceedings and commitment are void. These averments are not mere matters of form, but are substantially essential. *Supreme Ct. Circuit*, 1846, *People v. Charles*, 1 *Edm.*, 264.

VARIANCE.

1. Under a complaint seeking to recover a *quantum meruit*, proof tending to show an express contract at a fixed price, is not a variance. The only effect, in such a case, of proof of an express contract fixing the price is, that the stipulated price becomes the "*quantum meruit*" in the case. *Ct. of Appeals*, 1865, *Fells v. Vestvali*, 2 *Keyes*, 152.
2. Where accommodation paper is discounted for a less sum than the nominal amount, it is not a material variance to plead the note in the usual form adopted where the whole amount is sought to be recovered, and prove the special character of the discount to repel the defense of usury. [6 *Wend.*, 637; 17 *Id.*, 431; 22 *Id.*, 559.] *Ct. of Appeals*, 1864, *Schoop v. Clarke*, 1 *Keyes*, 181.
3. Answer of usury alleging interest deducted on the discount of two drafts, at the rate of two per cent. a month: proof that the drafts were discounted at different times by separate contracts, and at a rate of one-eighth of one per cent. a day.—*Held*, a material variance. *Ct. of Appeals*, 1866, *Griggs v. Howe*, 3 *Keyes*, 166; *S. C.*, 2 *Id.*, 574; affirming 31 *Barb.*, 100.
4. Indictment for stealing from the person: verdict, guilty, as charged, of grand larceny, in stealing from the person,—*Held*, no variance. *Ct. of Appeals*, 1865, *Fallon v. People*, 2 *Keyes*, 145.
5. Where there is a variance between the complaint and the proof, in regard to the time of delivery and acceptance of property, which has not misled the defendant, the court, in the exercise of its discretion, may direct the jury to find the fact according to the evidence. *Supreme Ct.*, 1867, *Babbett v. Young*, 51 *Barb.*, 466.
6. *It seems*, that under an averment of a recommendation of Dr. James Clark's pills, evidence of the recommending of Dr. Clark's pills is not a variance. *Crichton v. People*, 1 *Keyes*, 341.

WASTE.

VENUE.

Where a declaration against a sheriff contains a count for an affirmative act,—*e. g.*, false return,—and one for omission of duty,—*e. g.*, neglect to levy,—if the second count is sustained by the evidence, the venue is transitory, and plaintiff should not be nonsuited because the omission to levy related to property without the county. *Supreme Ct. Circuit*, 1847, *Wilson v. Jenkins*, 1 *Edm.*, 384.

WAIVER.

1. The service, with an answer served out of time, of the only notice of appearance for the defendant given in the action, indorsed thereon, may, where such notice waives an advantage of the defendant detrimental to the plaintiff's proceedings—such as a misnomer—so far operate to render such an appearance contingent on the acceptance of such answer as served in time, as to render the retention of both a waiver of such irregularity, notwithstanding a verbal notice at the time of such service, and a subsequent written one, of a refusal by the plaintiff's attorney to receive such answer; particularly where the latter has availed himself of such appearance by serving notice of assessment of damages on the attorney. *N. Y. Superior Ct. Sp. T.*, 1866, *Lynch v. Andrews*, 5 *Rob.*, 611.
2. Where an action has been commenced to recover demised premises for a forfeiture occasioned by a breach of covenant in the lease, the acceptance of rent due after the forfeiture, is not a waiver of the forfeiture. *N. Y. Superior Ct.*, 1867, *Importers' & Traders' Ins. Co. v. Christie*, 5 *Rob.*, 169.

WARRANT.

A warrant for arrest upon a criminal charge, directed to the sheriff or any constable of any county, and indorsed on the back by the magistrate with an authority to a private individual to arrest the within named offender, does not afford a justification to such an individual for making the arrest. A warrant must be directed to a person who is by it commanded to make the arrest, and an indorsement merely conferring an authority in the nature of a commission or license, is not a sufficient direction. *Supreme Ct.*, 1868, *Abbott v. Booth*, 51 *Barb.*, 546.

SCHOOL DISTRICT; VAGRANTS.

WASTE.

Although the common law doctrine of waste is not strictly applicable in this country, yet such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific

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leave or license to cut such trees or timber, is waste for which action will lie, in equity, for the prevention of such injury by injunction, before it is committed, or at law, for the recovery of damages, by the remainderman, after the injury is done. *Supreme Ct.*, 1868. *McCay v. Wait*, 51 *Barb.*, 225.

WILL.

1. It is essential to the due execution of a will, under the laws of this State, that the witnesses, who are to attest the subscription and publication thereof by the testator, should sign the same, after the subscription by him. Where the signature of the testator is by his mark, it is no objection that the words "his name," and the words "his mark" were written by a witness after he made his mark, and that no proof of distinct direction to him by the testator was given. The circumstance that the attestation clause does not recite all the details, is of no importance. [10 Paige, 85; 3 Bradf., 35; 4 Wend., 282.] *Ct. of Appeals*, 1868, *Jackson v. Jackson*, 39 *N. Y.*, 153.
2. No unvarying rule, as to the amount of proof necessary to establish the execution of a will, can be laid down which is to control every case, as the circumstances of each case must differ from any other. Hence, it becomes the duty of the court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and, if it is, to receive the same. *Supreme Ct.*, 1868, *Rider v. Legg*, 51 *Barb.*, 260. *S. P.*, *Ct. of Appeals*, 1865, *Nexsen v. Nexsen*, 2 *Keyes*, 229.
3. Where all the three subscribing witnesses to a will, executed since the Revised Statutes took effect, are dead, proof of the signature of two of them, with a perfect attestation clause, and other circumstances tending to favor the probability that the will is genuine, are sufficient, after a great lapse of time, to justify the reception of the will as evidence, without proof of the signature of the other subscribing witness and testatrix. *Supreme Ct.*, 1868, *Rider v. Legg*, 51 *Barb.*, 260.
4. A direction in a will that all the residue of the estate shall remain in the hands of the executors, or under their control, for the use of the testator's wife and children, while under age, and that after the youngest child shall have arrived at age, the same shall be divided among the children,—does not give the executors an estate in trust. *Supreme Ct.*, 1868, *Burke v. Valentine*, *Ante*, 164.

WITNESS.

1. Testimony of witnesses of deficient moral sense or capacity, to be received with caution, rather than to be struck out. *People v. Harper*, 1 *Edm.*, 180.
2. An architect is a competent witness in his own behalf, upon the question

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- of the value of his labor in drawing plans. *Ct. of Appeals*, 1866, *Nourry v. Lord*, 2 *Keyes*, 617.
3. A party to an action should not be permitted to give in evidence a memorandum made by *himself*, to prove the terms of a contract between him and his adversary, which has been made by him privately, and never shown to the other party. *Supreme Ct.*, 1868, *Meacham v. Pell*, 51 *Barb.*, 65.
 4. In an action to compel specific performance of a contract by a person since deceased, the plaintiff is entitled to be sworn as a witness on his own behalf, except as to transactions had with the deceased personally; and a refusal to permit him to be sworn is error, for which the judgment should be reversed, unless it is clear that if sworn he could not have testified to any fact material to his case. Although he could not testify to the making of the contract, he might testify to admissions on the part of the heirs, or to other facts bearing on the existence of such a contract. *Ct. of Appeals*, 1868, *Card v. Card*, 39 *N. Y.*, 317.
 5. In an action by a woman to recover money lent, it is not erroneous to ask the plaintiff, when examined as a witness in her own behalf, if she is the wife of the defendant. For if so, she cannot be sworn as a witness against him; and he does not waive the objection to her competency by allowing her to be examined in chief. Her statement, in her complaint in a former action, of her marriage to the defendant, is proper evidence to show her incompetency as a witness in the later suit. *N. Y. Superior Ct.*, 1867, *Schmidt v. Herfurth*, 5 *Rob.*, 124.
 6. One who is a mere surety, to enable another to prosecute or defend an action, is not a person for whose benefit the action is prosecuted or defended; and is not incompetent as a witness under section 299 of the Code of Procedure. *Ct. of Appeals*, 1864, *Jessop v. Miller*, 1 *Keyes*, 321.
 7. It is now settled that a person transferring a promissory note is not the assignor of a thing in action, within the meaning of section 399. [18 *N. Y.*, 52.] *Ct. of Appeals*, 1864, *Bartlett v. Tarbox*, 1 *Keyes*, 495.
 8. Directions given by a client to his attorney touching the collection of a judgment, and the disposition of the money received thereon,—*Held*, not of the character which an attorney is prohibited from disclosing as a witness without the consent of his client. *Ct. of Appeals*, 1864, *Mulford v. Muller*, 1 *Keyes*, 31.
 9. Where the intent of the purchaser to pay or not is immaterial, as where no fraud is imputed to him, or where he testified that he had no intention of taking the goods, it is not error to exclude an inquiry as to whether he intended to pay. *Ct. of Appeals*, 1864, *Jessop v. Miller*, 1 *Keyes*, 321.
 10. Under the Code of Procedure, where the husband or wife is a party to, or interested in an action, he or she may be examined in the same manner, and subject to the same rules of examination, as any other witness, except that they can not be required to disclose any confidential communication made to each other during marriage. *Ct. of Appeals*,

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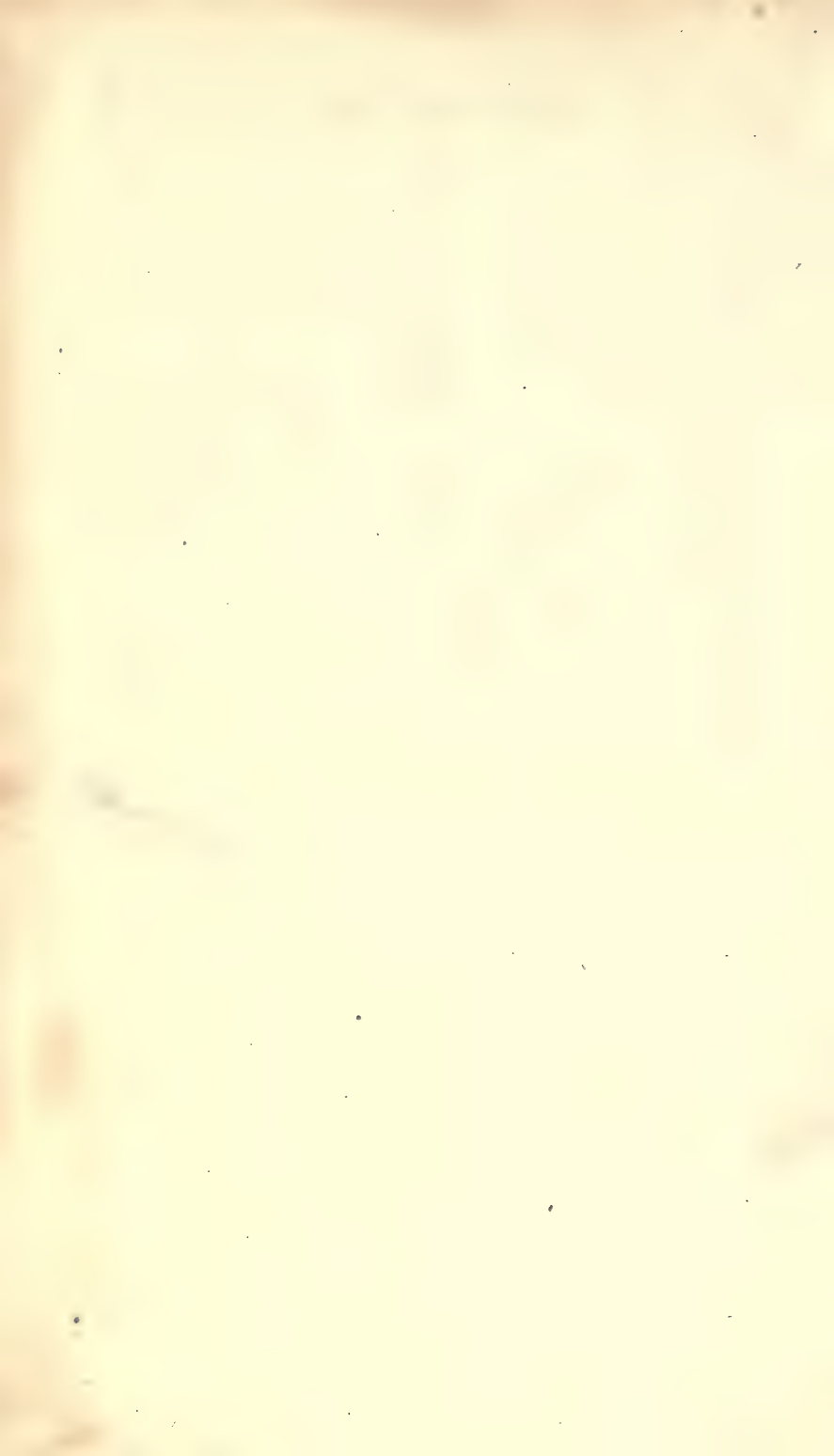
- 1864, *Wehrkamp v. Willett*, 1 *Keyes*, 250. S. P., 1868, *Card v. Card*, 39 N. Y., 317.
11. Although the evidence of husband or wife is receivable, in a collateral proceeding, for the purpose of proving any fact material to the issue, it can not be admitted, in any proceeding whatever, for the sole and direct purpose of impeaching the testimony of the other. *N. Y. Com. Pleas Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, *Ante*, 54.
 12. When a witness states a particular fact, which it is material for the party who called him to controvert, the latter is at liberty to prove the truth in respect to such fact, even though such proof would tend to affect the credit of the witness. Hence when a plaintiff's witness, on cross-examination, testified to a promise on the part of the plaintiff to reward him if he should succeed in the action, it was held error to exclude evidence on the part of the plaintiff (who had been a witness in his own behalf) to contradict this testimony. *Buffalo Superior Ct.*, 1867, *Bemis v. Kyle*, *Ante*, 232.
 13. The rules applicable to the impeachment of witnesses,—stated. *Ib.*
 14. The only proper inquiry, on the direct examination of a witness, as to the character of another, is as to the general moral character of the latter, and his public reputation as a truthful or untruthful person. It is not permissible for the assailing party to show specific acts of immorality or misconduct, with the view of impeaching or discrediting a person as a witness. *Ct. of Appeals*, 1864, *Wehrkamp v. Willett*, 1 *Keyes*, 250.
 15. Affidavits made to obtain a new trial,—*Held*, not admissible on the trial to contradict the testimony of the party. *Ib.*

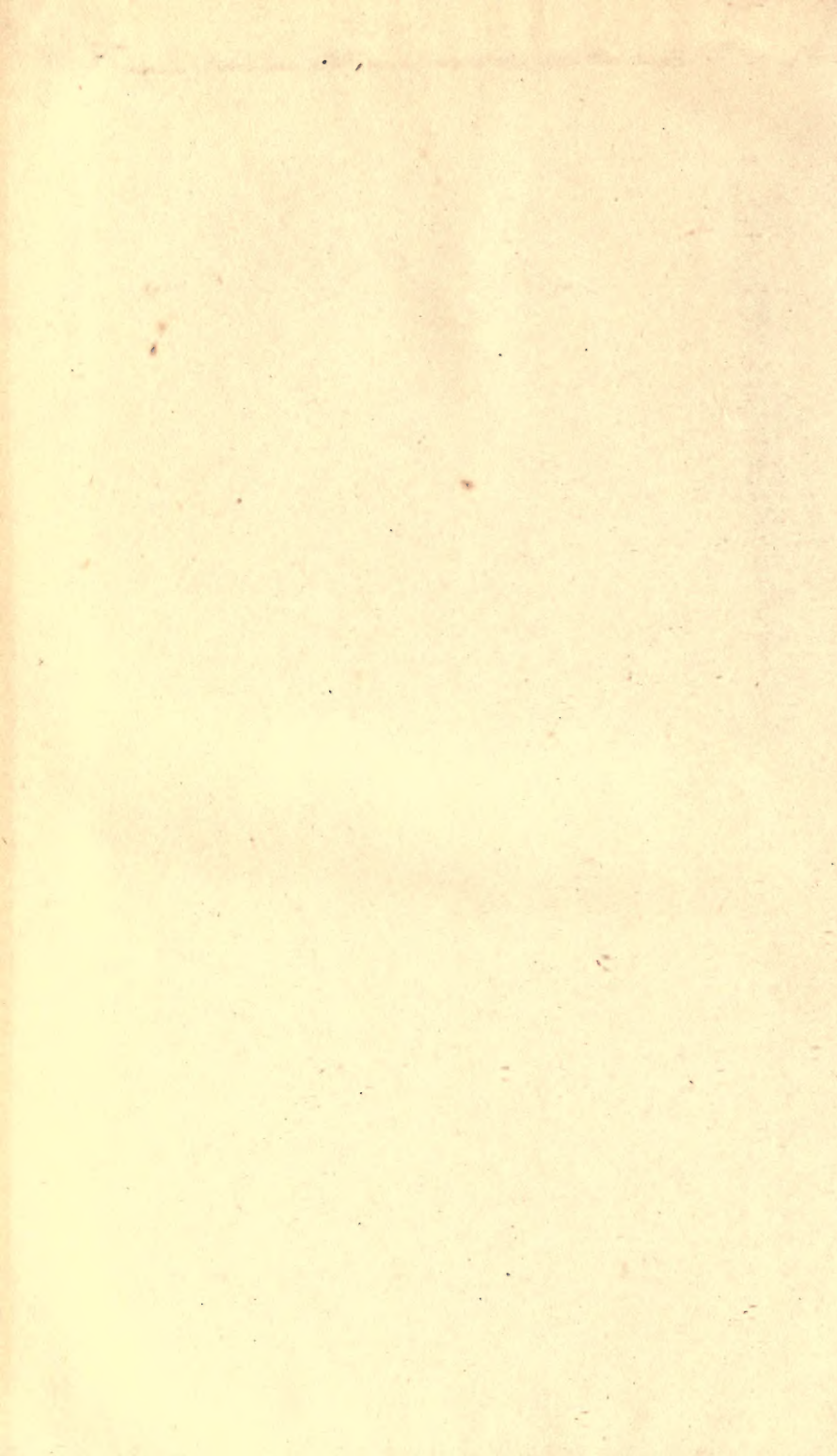
EVIDENCE, tit. Opinions of Witnesses; TRIAL.

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CERTIORARI; EXECUTION; MANDAMUS; PROHIBITION.

THE END.





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